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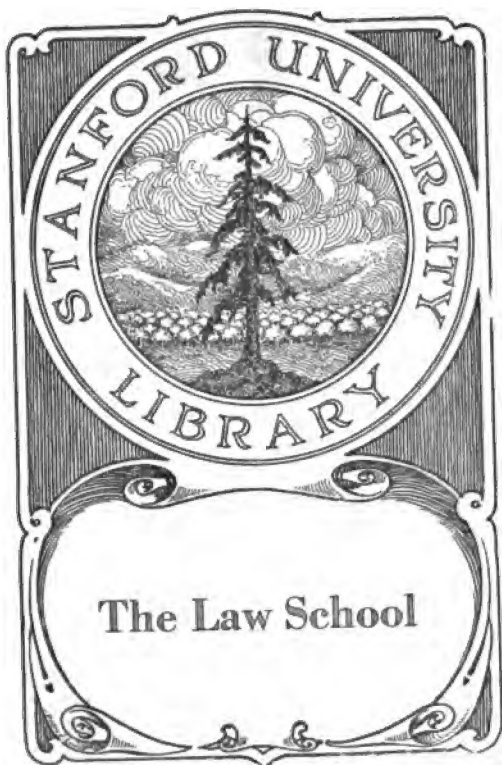
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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF VICTORIA.

BY

ALFRED WYATT,

OF THE MIDDLE TEMPLE, LONDON;

GEORGE H. F. WEBB,

OF THE SUPREME COURT OF VICTORIA;

AND

THOMAS A'BECKETT,

OF LINCOLN'S INN, LONDON;

ESQUIRES, BARRISTERS-AT-LAW.

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Isaac A. Smith

JUDGES
OF THE
SUPREME COURT OF VICTORIA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

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SIR REDMOND BARRY, KNT.
EDWARD EYRE WILLIAMS, ESQ.
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GEORGE HIGINBOTHAM, ESQ.

SOLICITOR GENERAL.
VACANT.

A T A B L E

OF THE

NAMES OF THE CASES REPORTED

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Victoria, IN EQUITY,

BEFORE

HIS HONOUR ROBERT MOLESWORTH, Esq.,

ONE OF THE JUDGES OF THE COURT,

AND ON APPEAL TO THE FULL COURT.

WOODWARD v. JENNINGS.

BY Indenture of Settlement, dated the 26th June, 1840, and made between *George Woodward*, of the one part, and *Joseph G. Jennings*, *John E. Addison*, and *John Walker*, of the other part, after reciting that *Woodward* had placed in the Union Bank in Hobart Town £700 in the names of *Jennings*, *Addison*, and *Walker*, it was declared that they should stand

upon anticipation. By arrangement between the agent of the trustees, and the husband of the *c.q.t.*, who was a mortgagor of such agent, the annual income of the trust property was set-off against the interest payable by the husband to the agent; and no interest was demanded by, or paid to, the *c.q.t.* for six years. In a suit by the *c.q.t.* against the trustees, the evidence as to the express assent of the *c.q.t.* to the arrangement between her husband and the agent of the trustees being conflicting,

Held, that whether she did or did not assent was immaterial, she being bound by her acquiescence in the virtual receipt of the interest by her husband.

An official assignee who takes no interest in property settled upon the wife of the insolvent, but who is made a party to a suit respecting such property, is entitled to his costs against the Plaintiffs.

An official assignee of a person taking a beneficial interest under a settlement, who refuses when applied to to become a co-plaintiff, but does not then disclaim, and is therefore necessarily made a Defendant, is not entitled to his costs.

1863.

Dec. 11, 12, 18,
19.

1864.

February 4.

Personal property was vested in trustees upon trust to invest and pay the annual income to a *feme covert*, for her separate use, with a restraint

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possessed of that sum upon trust, to invest the same, with the assent of Mr. and Mrs. *Woodward* during their joint lives, on real securities or shares in public companies, as therein mentioned; and receive the interest, dividends, or annual produce thereof, and pay the same during the joint natural lives of *George Woodward* and *Anne* his wife unto such person or persons only and for such trusts intents and purposes only as the said *Anne* notwithstanding her coverture and as if she were sole and unmarried should by any writing under her hand direct or appoint but not so as to deprive herself of the benefit thereof by mortgage sale charge or other mode of anticipation and in default of such direction into her own proper hands for her sole separate and peculiar use and benefit independently and exclusively of the said *George Woodward* and so as not to be in any wise subject or liable to his debts control interference or engagements; and that her receipt or receipts in writing alone, notwithstanding her coverture, should be good and sufficient discharges for the same.

In 1853, the trustees, at the request of Mr. and Mrs. *Woodward*, transmitted £600 of the trust-money to Mr. *H. Jennings*, in Melbourne, for investment in Victoria. In July, 1854, £200 of this sum was, with the consent of Mrs. *Woodward*, lent to her husband by *H. Jennings*, on the security of leasehold property in Melbourne, known as the Carriers stables. *Woodward* being then indebted to *H. Jennings* in the sum of £400, a mortgage of this property was executed by *Woodward* to *H. Jennings* individually for £600. Subsequently an arrangement was made between *Woodward* and *H. Jennings* that the remaining £400 of the trust money then in *H. Jennings's* hands should be applied by him in liquidation of his own debt, and that he should execute a transfer of the mortgage for £600 to the trustees of the settlement. This transfer was, however, never executed. There was a conflict of evidence as to whether this arrangement was sanctioned by Mrs. *Woodward*. In

October, 1856, *Woodward* repaid to *H. Jennings* £100 of the £200 trust money originally lent, but he never paid more; and the property, through depreciation in value, became an insufficient security for the balance. In May, 1858, *Woodward* became insolvent. In October, 1859, *H. Jennings* entered as mortgagee into possession of the Carriers stables. In June, 1860, the £100 repaid by *Woodward* in October, 1856, and which had till then remained in *H. Jennings's* hands, was with the consent of *Mrs. Woodward* lent to her son, *J. M. D. Woodward*, who also agreed to take upon himself the payment of the remaining £100 originally lent to his father; and being indebted to *H. Jennings* in some other sums, he executed a mortgage to the trustees for £290 upon certain real property at Boroondara. There was no assent given by *Mrs. Woodward* to an investment of more than £100 of the trust money upon the Boroondara property. From 1853 to 1859 no interest was received by *Mrs. Woodward* in respect of the £600 transmitted to Melbourne. In October, 1859, she applied to *H. Jennings* for her interest, which was thenceforward paid by him at the rate of £15 per quarter. By a receipt dated 25th May, 1860, *Mrs. Woodward* acknowledged the receipt of interest at this rate up to the 18th of April, 1860. Subsequently various small payments were made by him to her on account of interest.

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In December, 1861, *Mrs. Woodward* applied to *H. Jennings* and the surviving trustees, *J. G. Jennings* and *Walker*, for the replacement of the £400 trust money mis-invested on the Carriers stables, and for payment of arrears of interest from 1853. Proposals for a settlement were made by the trustees, but no arrangement being completed, the present suit was instituted in January, 1863, by *Mrs. Woodward* and her son *F. R. G. Woodward*, as Plaintiffs, against the trustees *J. G. Jennings* and *Walker*, *H. Jennings*, and the official assignees of *George Woodward* and *J. M. D. Woodward*.

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The bill alleged that £200 only of the trust money was ever lent to *George Woodward*, with the assent of the Plaintiff *Anne*; that the investment upon the Carriers stables, being leasehold property, was not authorized by the settlement; but offered to accept the mortgage over the Boroondara property as a security for £200 of the trust money, and prayed that the trustees and *H. Jennings* might be ordered to replace the £400 mis-invested, and to account for the interest of the trust fund from 1853; and that new trustees might be appointed.

The Defendants, the trustees and *H. Jennings*, by their answers offered to replace the £400; to pay the balance unpaid of interest accrued due after October, 1859, and also to pay the costs of the suit up to the delivery of their answers. *H. Jennings* by his answer alleged that the Plaintiff *Anne*, in July, 1854, on the occasion of the mortgage of the Carriers stables being executed, expressed her desire that her husband should receive the income arising from the £600 trust money, and that it was accordingly arranged that such income should be applied by *H. Jennings* in payment of the interest upon that mortgage; and that such income was in fact so applied by him, *George Woodward* having paid no interest whatever upon this mortgage.

A lengthened correspondence took place between the solicitors of the various parties with a view of settling the suit on the terms offered by the answer; but in consequence of the delay arising from difficulties interposed by various parties, the suit was ultimately proceeded with.

The evidence as to Mrs. *Woodward's* consent to the alleged arrangement as to interest was conflicting, she denying that she had ever given any such consent, and alleging that she allowed her income to accumulate in the hands of *H. Jennings*, she having no immediate necessity

for it, until after her husband's insolvency, when she applied to *H. Jennings* for payment of the arrears, and also of the accruing income.

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The suit now came on for hearing. The only points argued were as to the liability of the trustees for the income prior to October, 1859, and as to the costs of the suit.

Mr. *Lawes* for Mr. *Jacomb*, official assignee of *George Woodward*; and Mr. *Purcell* for Mr. *Shaw*, official assignee of *J. M. D. Woodward*, appeared to ask for their costs, and cited *Higgins v. Frankis* (a), and *Bellamy v. Brickenden* (b).

Argument.
—

Mr. *Webb* for the Plaintiffs, *contra*. These Defendants having disclaimed, are not entitled to their costs. They never offered to disclaim prior to the institution of the suit, and it is not necessary that the plaintiffs should have applied to them to disclaim. *Ford v. Chesterfield* (c), *Ward v. Shakeshaft* (d).

MR. JUSTICE MOLESWORTH:—

Mr. *Jacomb*, as official assignee of *George Woodward*, takes no interest under the settlement, and should not have been made a party to the suit. I think therefore he is entitled to his costs against the Plaintiffs. It appears by the settlement that *J. M. D. Woodward* took a beneficial interest under it. It is stated by the bill that his official assignee was asked to become a co-plaintiff and refused. He did not then disclaim, and the Plaintiff was bound to make him a party. In cases where some residuary legatees have filed a bill, and others of them, having refused to join as Plaintiffs,

(a) 20 L.J. (N.S.) Chy., 16.
(b) 4 K. & J., 670.

(c) 16 Beav., 516.
(d) 1 Drew & Sm., 269.

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were necessarily made Defendants, they have been left to abide their own costs; and my impression is that Mr. Shaw will not be entitled to his costs.

Mr. *Billing* and Mr. *Webb* for the Plaintiffs. As to the question of interest, Mrs. *Woodward* never assented to the alleged arrangement that her income should be set-off against the interest payable by her husband upon his mortgage. Any such assent as to income thereafter to accrue, if given, would not have bound her, she being restrained from anticipation by the terms of the settlement. *Harnett v. M'Dougall* (e), *Moore v. Moore* (f), *Clive v. Carew* (g), *Pemberton v. M'Gill* (h), *Wilton v. Hill* (j). There is no evidence of the wife's acquiescence in this arrangement, and on the contrary she denies that she ever knew of it. This case does not therefore fall within the principle of *Rowley v. Unwin* (k), where the wife admitted she had allowed her husband to receive the income of her separate estate. Here the wife's money was never received by the husband, but is alleged to have been made matter of set-off between her husband and H. *Jennings*, as the quasi trustee. As to costs, the bringing of the suit to a hearing has been altogether necessitated by the Defendants declining practically to carry out the offer of payment made by their answer. That offer was accepted by the Plaintiffs immediately upon the answers coming in in June last; but the money was not paid in consequence of objections as to matters of detail which were from time to time raised by the Defendants, or their solicitors, and in November the Plaintiffs were driven to proceed with the suit in order to obtain a settlement of the matter. Under these circumstances the Defendants ought to pay the entire costs of the suit.

(e) 8 Beav., 187.

(f) 1 Coll., 54.

(g) 1 Johns & H., 190.

(h) 8 W. R., 290.

(j) 25 L. J. (N. S.) Chy., 156.

(k) 2 K. & J., 138.

Mr. J. W. Stephen for the Defendants J. G. Jennings and Walker. These defendants admit that they are liable to replace the £400; and have offered by their answer to do so. As to the income, there has been such an acquiescence by Mrs. Woodward in the receipt of the income by her husband down to October, 1859, that she is not now entitled to an account of the income prior to that. *Leach v. Way* (l), *Bartlet v. Gillard* (m), *Caton v. Rideout* (n), *Thrupp v. Harman* (o), *Buckeridge v. Glasse* (p). *Fitzgibbon v. Blake* (q). Where the wife has allowed her husband to receive her separate income, she can at the most claim from the trustees one year's arrears, and in some cases it has been held that she cannot claim even that. *Lewin on Trusts*, 4th ed., 500, *Arthur v. Arthur* (r), *Payne v. Little* (s). As to costs, the prosecution of this suit since the answer has been altogether unnecessary, and the Plaintiff should therefore pay the subsequent costs occasioned thereby; the Defendants having by their answer offered to pay all the costs up to the answer. *Millington v. Fox* (t).

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Mr. T. A'Beckett for the Defendant H. Jennings.

Mr. Billing in reply.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH (after stating the facts of the case as stated above):—

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In argument before me, the Defendants H. Jennings and the trustees gave up the question of replacing the £400;

- (l) 5 L. J. (N.S.) Chy. 100.
- (m) 3 Russ., 149.
- (n) 1 Mac. & G., 599.
- (o) 3 Myl. & K., 518.
- (p) Cr & Ph., 137.

- (q) 3 Ir. Ch. Reps., 328.
- (r) 11 Ir. Eq. Reps., 511.
- (s) 26 Beav., 1.
- (t) 3 Myl. & Cr., 338.

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but the points argued related to the interest prior to October, 1859, and the liability to costs of suit.

There has been a conflict of evidence as to whether Mrs. Woodward directly assented to the investment of the £400 trust money upon the Carriers stables, and to the application by *Henry Jennings* of the interest of the trust fund before October, 1859, to discharge the liabilities of *George Woodward*. If it were material, I should decide those points against the Plaintiff; but however expressly she assented as to the former, the trustees are confessedly bound to replace the £400; and whether she did or did not assent to the latter I think immaterial (except in some degree as to costs), as I think she is bound by her acquiescence in the virtual receipt by her husband of the interest in dispute.

By a long series of authorities collected in *Lewin on Trusts*, 4th ed., 499, 500, a wife entitled to separate estate allowing the interest to be paid to her husband, and being supported by him, cannot recover from him, and *a fortiori* from the trustees, more than one year's arrears of income, and as to that last there is a doubt. See also *Leach v. Way*, *Bartlett v. Gillard*, *Buckeridge v. Glasse*, *Rowley v. Unwin*. In the earlier cases the precise language of the trusts for separate use do not appear. In *Thrupp v. Harman*, and *Howard v. Digby (v)*, besides some of those last referred to, the words appear as stringent as in the present case, and in both the wife was held bound, though the money was not paid into her hands, or upon her receipt. I have in vain sought for any case in which the Judge gave reasons for disregarding the restriction. I should say that these trusts are creations of courts of equity, in some degree breaking through the principles of the common law, that a woman should have no property apart from her husband, and that all property

is alienable and disposable by the owner in such a way as he or she may please, with such formalities only as the law imposes upon both sexes. Though the courts of equity have, in compliance with a modern sentiment of convenience, after a struggle, held that married women may have property not alienable by anticipation, yet they have not allowed that in their case the manner of paying the income to them, or the evidence of it being paid, shall be altered. See *Powell v. Hankey* (w). Opposite decisions would have enabled married women to convert stipulations for their protection into instruments of gross fraud upon persons dealing with them.

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Judgment.

On the subject of costs only I have had difficulty. The Defendants, *H. Jennings* and the trustees, are admittedly subject to the Plaintiff's costs, down to the filing of the answers. As to the subsequent costs, the Plaintiffs have failed in the matter in dispute as to liability to back interest; and I should have been disposed to have given the trustees costs against them, were it not that, pending this litigation, the Plaintiff *Anne* has been deprived of that to which confessedly she is entitled, the accruing interest. Trustees consenting to replace capital, to be handed to new trustees to be appointed, may fairly postpone paying until there is a person authorized to receive; but as to income, the Plaintiff was entitled to it during the suspense of investment, arising from the trustees' default, and was competent to receive. The Plaintiff's solicitor, by letters to *Henry Jennings*, dated April 30, 1863, August 25, 1863, September 17, 1863, expressly called attention to the extreme distress to which she was reduced by the want of income, and sought payment. But no offer to pay it, pending the delay arising from disputes over petty details of adjustment, was made. The solicitor of *Walker*, the trustee, then, after the Plaintiff's patience had been long

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 ———
Judgment.

strained, started a difficulty about the residence of new trustees. The objection itself was a reasonable one, and it is very fair that trustees who have to replace a trust fund, unintentionally and without profit to themselves misapplied, should guard against having to replace it twice; but this difficulty ought to have been discovered before, and *Walker*, leaving the country, ought to have left an agent here authorized to represent him fully. This withholding of the interest has led me not to give the Defendants, trustees, their costs subsequent to the answer.

At the opening of the case, I expressed my opinion that Mr. *Jacomb*, official assignee of *George Woodward*, had no interest in the fund; therefore ought not to have been made a party, and should have his costs against the Plaintiffs. I also expressed an opinion that *Shaw*, assignee of *J. M. D. Woodward*, had, and has, a valuable interest in the fund which the Plaintiffs have realized, was therefore a proper party, and should, notwithstanding his disclaimer, abide his own costs.

It is not now sought by either party, as I understand, that new trustees should be appointed. *Henry Jennings* admits his liability to indemnify the trustees, and as to money paid for the trust fund and interest, I shall decree that he do so according to cases in *Levin*, 639, and *Latouch v. Dunsaney* (x). As to costs, I find by 2 *Daniel*, 1051, that the only way in which I could enforce indemnity would be by making the Plaintiffs pay the costs of the trustees, Defendants, and have them over against *Henry Jennings*, which would be very unjust to the Plaintiffs, in case he should prove insolvent.

I have had some doubt as to the rate of interest with which the Defendants should be charged since October,

(x) 1 Sch. & Lef., 137, 2 *Id.*, 690.

1859, on £400, as to the time up to which the account should be regarded as settled, and as to the credits against interest. I think the allowance of ten per cent. is so far connected with the Plaintiff *Anne* permitting the fund to remain as it was, that she should have ten per cent. interest until she withdrew that permission, and from thence forth should have only eight per cent. interest. I think that the receipt of the 25th of May, 1860, should be taken as a settlement down to the 18th of April, 1860. Thus the debits will be interest at ten per cent. to October, 1861, about £60; interest from October, 1861, to investment ordered at eight per cent. The parties seem to be agreed as to credits against this, and I hope will so far agree as to enable me, by consent, to dispense with a reference to take the account. Assuming that I can so fix the sum, I shall order the Defendant *Henry Jennings, J. G. Jennings, and John Walker*, to pay the same to the Plaintiff *Anne* within the same three calendar months.

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—
Judgment.

In settling the accounts the parties can use their discretion as to whether interest and payments on account of the Tasmanian £100 are to be included, and the decree, on a sum fixed by consent, should say how it is done; also, if a reference is necessary, I should wish the parties to say if it should embrace that £100.

“ Declare that the Defendants *Henry Jennings, Joseph J. Jennings, and John Walker*, are bound to replace the sum of £400 of the trust funds settled by the indenture of June 26, 1840, and order that they do, within three calendar months, at their own costs, invest that sum in a security conformable to that settlement upon the trusts thereof still capable of taking effect in the names of the said *J. G. Jennings and John Walker*, such investment to be with the approbation of the Master, in case the said *George Woodward* and *Anne* his wife do not consent thereto. Declare that the said *J. G. Jennings and John Walker* shall hold the mortgage of the 29th June, 1860, over property in Boroondara, as a security for £200, other portion of the trust fund and interest at ten per cent., and subject thereto, in trust for the Defendant *Henry Jennings*. Direct that within three calendar months the said *J. G. Jennings and John Walker*, at their own costs, execute a declaration of trust thereof. Declare that the said *J. G.*

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 ~~~~~  
 WOODWARD  
 v.  
 JENNINGS.  
 ———  
*Judgment.*

"*Jennings and John Walker* shall hold the said sums of £400, £200, "and the sum of £100, which has remained in their hands upon the "trusts of the said settlement. Order that the Defendants *H. Jennings*, "*J. G. Jennings and John Walker* do within three calendar months pay "to the Plaintiff *Anne* the sum of £ , for arrears of interest on the "said sum of £400 since the 18th April, 1860. Order that *Henry Jen-* "*nings*, within three months after payment by the said *J. G. Jennings* "and *John Walker*, or either of them, of the said sum of £400, and "interest thereon, or any part thereof, repay the same, with interest at "eight per cent., to the person or persons making such payment. Order "that the Defendants *H. Jennings, J. G. Jennings and John Walker* "pay the Plaintiffs their costs of suit up to the filing of the last of their "answers. Order the Plaintiffs to pay the costs of *E. E. Jacomb*. Let "all parties abide their own costs up to the present time, save as herein "provided."

# RICHARDSON v. ARTHUR.

February 8.

*J. R.* conveyed certain real and personal property to *A. and T.*, on trust, to pay the income to himself for life, and after his death to *R.* for life. The conveyance in trust was revocable by *J. R.* and *R.* jointly, and a deed of revocation was executed by them. After the death of *J. R.* a bill was filed by *R.* against *A.* and *T.*,

THIS was a suit by *John Richardson* against *James Arthur* and *George Thomas* charging a fraudulent misappropriation of a trust fund, and seeking accounts and restitution.

The bill alleged that on the 27th of June, 1862, *John Richardson*, jun., son of the Plaintiff, executed a deed of trust, by which certain land, and also two sums of £800 and £150, secured to *John Richardson*, the younger, on mortgage of other lands, were made over by him to the Defendants, upon trust, during the joint lives of the *Richardsons*—son and father—to pay 10s. per week to the father, and the balance of the income to the son; after the death of either to pay the whole income to the survivor; and after the death of the survivor to convert all into money, and divide the proceeds between the Geelong

alleging that the execution of the deed of revocation by *J. R.* and himself had been fraudulently obtained by *A.*, and praying that the trust should be declared as subsisting unrevoked, and that the monies lost to the trust by means of the pretended revocation should be made good by *A. and T.*

Held, that the personal representative of *J. R.* was a necessary party to the suit, he being interested in supporting the deed of revocation.

Hospital, the Geelong Protestant Asylum, and the Geelong Catholic Orphan Asylum, equally. That this settlement of the son's property was irrevocable by him, except with the consent of the father. That the settlor was intemperate, weak, and infirm, and that *Arthur* took advantage of his weakness and infirmity, and induced him to execute a transfer of the mortgage for £180, and a revocation of the settlement so far as concerned this sum. That Plaintiff also executed this deed, but knows not its contents; and that both he and the settlor executed it believing and intending that the £800 would be re-invested and remain subject to the trusts of the settlement. That after the revocation *Arthur* obtained the £800, and with it bought property for himself, paid debts of his own, and retired bills which the settlor had drawn on him in favor of *Thomas*, against an old debt due from *Arthur* to *Thomas*. That after the revocation the settlor was plied with drink, and became incapable until his death. That *Thomas* knew of the misappropriation by *Arthur* of the £800. That *Arthur* has ceased paying, and has refused to pay, the Plaintiff his annuity of 10*s.* per week. The bill charged that the misappropriation of the £800 was a fraud on the settlor and the Plaintiff. It prayed for declarations that the settlement was not revocable by the settlor except with the consent of the Plaintiff, and that the Defendants are "liable to make good and replace the moneys by them, or either of them, applied to their or either of their own use and purposes as aforesaid, or otherwise than upon the trusts of the settlement; and for a decree that they should make good the same; and that, for the purposes aforesaid, all necessary accounts be taken."

The Defendant *Arthur* in his answer alleged that *John Richardson* the younger was well aware that the trusts of the settlement were revoked by the execution of the deed of transfer of the £800 security, and that the sum of £800 then paid had been expended by the Defendant for the

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 —  
*Statement.*

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*Statement.*

benefit of *John Richardson* the younger, and that upon taking accounts his estate would be proved indebted to the Defendant.

The Defendant *Thomas* denied any complicity in the transactions complained of, and alleged that he had retired from the trust prior to their occurrence.

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The suit now came on for hearing.

*Argument.*

Mr. *Laves*, for the Defendant *Arthur*, objected that the personal representative of *John Richardson*, the younger, the settlor, was a necessary party, and should have been joined as a Defendant. The bill impeached transactions before his death. His representatives might uphold the revocation, and justify the payment of the bills accepted by him in favour of *Thomas*. At all events, the account prayed for must cover those bills, and the representatives of the settlor must be before the Court on the taking of that account so far as concerned those bills. *Munch v. Cockerell* (y).

Mr. *Moore* and Mr. *T. A'Beckett* for the Plaintiff. We ask no account as to the interest of the settlor in his lifetime. Very likely his representatives are entitled to their bill in respect of that. It would be multifarious in us to join that in our bill, which is filed on behalf of the tenant for life in remainder after the settlor's death. In *Munch v. Cockerell* there were two parties entitled to two moieties. Here, since the settlor's death we are entitled to the whole, and we ask for nothing as to what occurred before the settlor's death. The Plaintiff is entitled to sue alone, under the Supreme Court Rules, cap. v., rule 6, he being

one of several *cestuis qui trustent* seeking an execution of the trusts of the settlement.

Mr. *Laure*s in reply.

Mr. *J. W. Stephen*, for the Defendant *Thomas*, took no part in the argument; but, as *amicus curiæ*, he mentioned *Watson v. Sawyers* (z).

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RICHARDSON  
v.  
ARTHUR.  
—  
*Argument.*

MR. JUSTICE MOLESWORTH:—

*Judgment.*

I think that *John Richardson's* representative is a necessary party to this suit. His presence is required for the protection of the Defendants. Were the Plaintiff to succeed in establishing his view of the case, and were the Defendants accordingly decreed to restore the £800 to the trust, they might in a suit by the administrator of *John Richardson* be called upon to account for that sum over again, as having received it discharged from the trust for the intestate's sole use, or as his agents. To such a suit it would be no answer to rely upon a decree in this suit declaring the £800 to form part of the trust fund, obtained in the absence of any representative of *John Richardson*, who would have been interested in supporting the deed of revocation by means of which the £800 became his own property. The objection not having been taken by the answer of either Defendant, I shall allow the cause to stand over, and give leave to amend, without costs.

*Cause to stand over. Leave to amend by making the personal representative of John Richardson the younger a party. No costs as to Defendant Arthur. Costs of Defendant Thomas to be costs in the cause.*

(z) Sup. Ct. Vic., Dec. 19, 1862.

1864.

Feb. 15, 18.

## COLLYER v. CORCORAN.

Plaintiff was legal and equitable mortgagee respectively of different portions of real estate of a deceased intestate, and as such instituted a creditor's suit against the intestate's personal representative and infant co-heiresses. Decree made for an account of the mortgage debts respectively, interest and costs; on non-payment within three months, for a sale of the equitably mortgaged premises; infant Defendants, declared trustees for the purchaser, under the decree; and Plaintiff directed to convey the equitably mortgaged lands to such purchaser, for the interest of the infants therein; the Plaintiff within the term assigned to sell under the power of sale in the legal mortgage; and in case proceeds of all these sales insufficient to pay Plaintiff's principal, interest, and costs, then general accounts directed of the intestate's real and personal estate.

**A**DMINISTRATION suit by mortgagee against the personal representative and infant co-heiresses of a deceased mortgagor, who had died intestate. The Plaintiff was under an indenture of mortgage with power of sale of the 15th of August, 1856, legal mortgagee of certain real estate of the intestate, and also equitable mortgagee by deposit of deeds, accompanied by a memorandum of equitable deposit of the 26th July, 1858, of other portions of the intestate's real estate. The Plaintiff had been in possession of a portion of the mortgaged premises.

Mr. *J. W. Stephen*, for the Plaintiff, applied for a decree for sale of the land comprised in the equitable mortgage, and asked that the decree might, under the *Trustee Act*, sec. 20, appoint the Plaintiff to convey to the purchaser the legal estate vested in the infant co-heiresses, to avoid the necessity of a subsequent application under the Act. *Seton on Decrees*, 799.

Mr. *Laves* for the infant Defendants.

MR. JUSTICE MOLESWORTH:—The Plaintiff being mortgagee in possession of a part of the mortgaged premises, should account with liability for wilful default for the rents and profits of that part. I will consider the precise form of the decree to be made.



MR. JUSTICE MOLESWORTH :—In this case I am prepared to make a decree as follows:—

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COLLYER  
v.  
CORCORAN.  
February 18.  
Decree.

“ Declare that the Plaintiff is entitled to be considered as mortgagee  
“ in equity upon the lands comprised in the title-deeds deposited by  
“ *Michael Corcoran*, deceased, with the Plaintiff on or about the 26th  
“ day of July, 1858, or in pursuance of the agreement of that date, for  
“ the sum mentioned in the memorandum of that date, interest and  
“ costs. Refer it to the Master to inquire and report the amount due  
“ on the mortgages of the 15th day of August, 1856, and the 26th day  
“ of July, 1858, respectively, charging the Plaintiff, as mortgagee in  
“ possession of the lands comprised in the mortgage of August 15, 1856,  
“ with the rents and profits which he may have received, or, without  
“ wilful default, might have received thereout. Let the Plaintiff pay  
“ the costs of the infant Defendants, and have the same over, with his  
“ own costs, and declare Plaintiff entitled thereto. Refer it to the  
“ Master to tax the said costs, and also the costs of the Plaintiff. In  
“ case the Defendants shall not pay the Plaintiff the sum found to be  
“ due for principal, interest, and costs, on the mortgage of July 26,  
“ 1858, including those of this suit, within three months after the  
“ ascertainment thereof, let the Master proceed to a sale of the last-  
“ mentioned mortgaged premises, and the proceeds of the sale be applied  
“ in payment of the sum due to the Plaintiff for the said mortgage of  
“ July 26, 1858. Declare that the infant Defendants, *Mary Ann*  
“ *Phelan* and *Johanna Phelan*, shall be trustees for the person or  
“ persons purchasing under this decree; and direct that the Plaintiff  
“ convey the lands comprised in the said mortgage of July 16, 1858,  
“ to such purchaser or purchasers for the right, title, and interest of the  
“ said infants therein. Let the Plaintiff, within the term aforesaid,  
“ proceed to sell the lands and premises comprised in the said mortgage  
“ of the 15th of August, 1856, under the powers in the said mortgage  
“ deed, to discharge the said mortgage. In case the sums produced by  
“ the said sales respectively be insufficient to pay off the amount upon  
“ the said mortgages, for principal, interest, and costs, as aforesaid, then  
“ let the said Master proceed to take an account of the debts, funeral,  
“ and testamentary expenses of the said *Michael Corcoran*, and of his  
“ personal estate and effects, into whose hands the same came, and how  
“ the same have been applied and disposed of; and also of his real  
“ estate and effects, into whose hands the same came, and how the same  
“ have been applied and disposed of. Reserve further directions, and  
“ costs.”

1864.

Feb. 15, 25.

## SUTHERLAND v. PEEL.

At an auction sale of land *B.* purchased lot 139, and *P.* lot 140. The clerk

erroneously entered *P.* as the purchaser of lot 139, and *B.* as the purchaser of lot 140, and conveyances were executed by the vendor accordingly. *B.* entered into possession of lot 139, and *P.* of lot 140; and each subsequently sold the lot of which he was in possession, but conveyed the lot of which the other was in possession, and such conveyances were duly registered. On a bill by the vendees of *B.* against the vendees of *P.*, to which neither *B.* nor *P.* were

parties, for rectification of the conveyances and to restrain an ejectment brought by the vendees of *P.* against the vendees of *B.*,

*Held*, that the bill was maintainable notwithstanding the apparent want of privity between the litigating parties; that the case should be dealt with simply on the ground of mistake; and that the Plaintiffs were entitled to a conveyance of lot 139, upon shewing their title to, and conveying lot 140 to the Defendants.

**S**UIT to restrain prosecution of an action of ejectment, and to have rectified the title deeds on the basis of which the action of ejectment was brought.

From the pleadings and evidence, it appeared that at a sale of a part of section No. 50, parish of Jika Jika, by *George Ward Cole*, in 1850, *William Bennett* purchased lots 139 and 140. An agreement was then and there made between *Bennett* and a Mr. *Plummer* that *Plummer* should take 140, and instructions by both were given accordingly to the auctioneer's clerk, who by mistake entered the sale from *Cole* as of 140 to *Bennett* and 139 to *Plummer*. Possession was taken by *Bennett* and *Plummer*, according to their intent and agreement, *i.e.*, of 139 by *Bennett*, and 140 by *Plummer*, but incorrect conveyances were executed—by mistake made in accordance with the auctioneer's clerk's erroneous entry—of 140 to *Bennett*, and 139 to *Plummer*. In 1852 *Plummer* sold one-half of 140 to a Mr. *Ashurst*, and the other half to the Defendant *M'Kenzie*; but by a continuance of the mistake, conveyed to them respectively the corresponding halves of 139. In 1859 *Ashurst* sold to the Defendant *Peel* his half of 140, but again by mistake conveyed the corresponding half of 139. *Bennett* erected two dwelling-houses on the lot of which he was always in possession, namely, 139, and in 1860 sold them to the Plaintiffs *Sutherland* and *George*, respectively; but the conveyances,

Registration is only important in deciding priority between inconsistent conveyances, each of which would be effectual but for the other; but gives no increased efficacy to conveyances impugned for fraud or mistake.

by mistake as before, were of corresponding portions of lot 140. The Plaintiffs respectively entered into possession of the houses on lot 139, and continued in possession thence to now. In 1863, *Peel*, intending to build on the portion of 140 which he had purchased, had the ground measured, and then discovered that his conveyance was of a similar portion of 139, on which the Plaintiffs houses were erected. He thereupon commenced an action of ejectment against the Plaintiffs, to recover the part of 139 conveyed to him.

1864.  
SUTHERLAND  
v.  
PEEL.  
—  
*Statement.*

The bill alleged that lot 139 was greatly improved by outlay on houses, and is now far more valuable than 140; that *Peel* well knew he purchased half of 140, and that the Plaintiffs have always claimed, and been in possession of, 139; but that *Peel* now fraudulently insisted that he purchased half of 139. The bill also alleged that *M'Kenzie* admitted he purchased half of 140, and was willing to have the deeds rectified.

Mr. *J. W. Stephen* for the Plaintiffs.

*Argument.*

Mr. *Holroyd* for the Defendant *Peel*.

Mr. *Webb* for the Defendant *M'Kenzie*.

*Cur. adv. vult.*

MR. JUSTICE MOLESWORTH:—

February 25.  
—  
*Judgment.*

The property in question is part of a suburban section in Collingwood, No. 50. Captain *Cole*, being the owner of it, in 1850 sold it in allotments; and Mr. *Bennett*, attending at the auction, purchased No. 139 of those allotments. The auctioneer induced him to take the adjoining allotment, No. 140, of similar dimensions, at the same price.

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 SUTHERLAND  
 v.  
 PEEL.  
 ———  
*Judgment.*

Mr. *Plummer*, who came shortly after, requested Mr. *Bennett* to transfer one of his bargains to him, and Mr. *Bennett* agreed to let him have No. 140. Accordingly, but probably by a mistake of the auctioneer's clerk, the memorandums of agreement were drawn, giving *Bennett* No. 140, and *Plummer* No. 139, and *Bennett* first, and *Plummer* after, had their conveyances prepared accordingly; but each entered into possession of the allotment which he intended to purchase, and *Bennett* built two houses on No. 139. In June, 1852, *Plummer* conveyed by deed one portion of No. 139 to Defendant *M<sup>c</sup>Kenzie*, and the other portion to Mr. *H. G. Ashurst*, respectively, who really intended to purchase and take possession of the corresponding portions of No. 140. *M<sup>c</sup>Kenzie* built a house on his supposed part. *Ashurst*, in 1859, sold to the Defendant, *Peel*, and conveyed the other portion of No. 139 to him, but *Peel* took possession of the corresponding portion of No. 140, both he and *Ashurst* being under the same misapprehension. No. 139 was then built upon, the part of No. 140 of which *Peel* took possession vacant, and both *Ashurst* and *Peel* dealt as for vacant land; and there is no reason to suppose that *Peel*, if No. 139 and No. 140 were both vacant, would have had any preference for one over the other as to locality. In 1860, *Bennett* sold one of the houses he had built to the Plaintiff, *Sutherland*, and the other to Mr. *Donald Mackay George*, and *D. M. George* in 1861 conveyed his house to the Plaintiff, *Sinclair George*. In these conveyances, the same misapprehension between the two allotments continued; the parties intended to deal with, and possession was taken of, No. 139; the conveyances were of No. 140.

The bill untruly describes the Plaintiffs as taking, by one conveyance from *Bennett*, as tenants in common. None of the parties to these conveyances took the trouble of ascertaining by measurement the correspondence between the land of which they took possession, and the description in their respective conveyances; and they might all in

that respect be charged with *crassa negligentia*. All took such possession as, if there were no deeds, would entitle them to specific performance.

1864.  
SUTHERLAND  
v.  
PEEL.  
—  
*Judgment.*

*Peel* being about to build, in 1863, took the precaution of having the position of his land ascertained by measurement, and found that he had no title, by deed, to the land in his possession; but had such title to the front part of the land on which each of the Plaintiff's houses stood; and he proceeded by ejectment to recover it. This bill is filed to restrain him, and to rectify the mistakes in the conveyances. *M'Kenzie* is made a Defendant, but submits to the relief prayed.

Such mistakes I have reason to think have often occurred about Melbourne, but appear so unusual in the mother country, that the counsel engaged and I have found few authorities closely parallel to the present case. That most resembling it is *Leuty v. Hillas (a)*. In that case the conveyances were rectified by the advertisements and the agreements for sale. In the present there is the same error in the agreements as there is in the conveyances; so that I have only parol evidence of the acts of the parties to show mistake. That case is calculated to remove one difficulty, which pressed upon my mind in this—the want of privity between the litigating parties. The Plaintiffs, vendees, or sub-vendees, of *Bennett*, are seeking to enforce an equity against the Defendants, vendees, or sub-vendees, of *Plummer*. But the litigation in *Leuty v. Hillas* was between distinct vendees of the same vendor, *Wild*, and the Court held *Wild* was improperly made a Defendant.

A case before Mr. *Pohlman*, as judge, has some resemblance to the present—*Von Geyer v. Brown (b)*. There a

(a) 2 De G., & J., 110.

(b) Sup. Ct. Vic., 30th April, 1861.

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 SUTHERLAND  
 v.  
 PERL.  
 Judgment.

person who had purchased Crown lands, before grant sold his right, and conveyed part of No. 18, he really being entitled to part of No. 23, and to it only. The grant of No. 23 afterwards issued to the vendor. The evidence of change of possession of the part of No. 23, in consequence of the bargain, was not at all as distinct as here; on the contrary, the vendor seemed for some time to have retained possession; but ultimately the vendee got, and for a long time held, undisturbed possession of part of 23. This was held, in a suit by the vendee against the heir and assignees in insolvency of the vendor, sufficient evidence of mistake between No. 18 and No. 23, and the conveyance was rectified accordingly. I have referred, also, as to this doctrine of mistake, to *Dacre v. Gorges* (c), *Okill v. Whittaker* (d), and *Carpmael v. Powis* (e).

The Plaintiffs' counsel has insisted that the Defendant is bound because his vendor, *Plummer*, permitted the building of the houses by *Bennett* without interruption; but, in the absence of fraud, the culpable negligence of *Plummer* and *Bennett* being equal, and the relief sought being against an assignee of *Plummer* without notice, I would not grant relief upon that ground.

The bill charges that the Defendant, when he purchased, had express notice of the equitable title of the Plaintiffs to allotment No. 139, and well knew that the Plaintiffs were then living in houses erected upon the said allotment by *Bennett*, as purchaser and owner thereof. This statement is quite contrary to evidence, and amounts to an imputation of fraud by the Defendant, in taking his conveyance, quite unsupported.

The Defendants' counsel have insisted upon the registration of his line of conveyances from *Cole*, as in some way

(c) 2 Sim. & S., 454.

(d) 2 Phil., 338.

(e) 10 Beav., 36.

strengthening his title; but I think registration is only important in deciding priority between inconsistent conveyances, each of which would be effectual but for the other, but gives no increased efficacy to conveyances impugned for fraud or mistake.

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 PEEL.  
 —  
*Judgment.*

Upon the whole, I think I should deal with this case simply on the ground of mistake. *Bennett, Plummer, Ashurst, D. M. George*, the Plaintiffs, and the Defendants, all respectively got possession of the allotment which each intended to purchase, but got conveyances of another. It would be inequitable for the Defendants to take buildings which they never intended to purchase, and never paid for, from the Plaintiffs, who did intend to purchase, and did pay for them, provided the Plaintiffs are able to give to the Defendants all for which they contracted. I think when the mistake was discovered the Plaintiffs were entitled to a conveyance of No. 139, upon showing their title to and being ready to convey No. 140 to the Defendants, and procuring releases to them for liability for their previous occupation of No. 140, all at the Plaintiff's expense. The Defendant *Peel*, discovering his claim to the land in Plaintiffs' possession, first intimated it by sending them a written demand of possession at a very short day. The Plaintiffs and *Bennett* called upon him on the subject, and offered, substantially, I think, that to which he was entitled. He asked, I think, too much when he required the Plaintiffs to pay him his purchase-money and interest, as the price of foregoing his right to No. 139; but I do not think his claim was so unconscionable as has been argued. The Plaintiffs were persons with whom he was in no privity, and from whom, if he preferred No. 140, he might have found it difficult to enforce conveyances. On the whole, as between the Plaintiffs and *Peel*, I would give relief without costs, assuming that the Plaintiffs are able to make title to No. 140.

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 SUTHERLAND  
 v.  
 PEEL.  
 Judgment.

As to *M'Kenzie's* costs, the Plaintiffs admit their liability to them, but seek to have them over against the Defendant *Peel*. Now, *M'Kenzie* and *Peel* had parallel but unconnected positions, and the Plaintiffs' right to succeed against one was independent of their right against the other. If *M'Kenzie* was, as he seems to have been, ready to concede to the Plaintiffs' rights, their adjustments and mutual conveyances might have been made out of Court; and the real reason for joining *M'Kenzie* as the Defendant was, I apprehend, that the Plaintiffs would not think it for their interest to take a conveyance from *M'Kenzie*, if they could not also get one from *Peel*; so that in any event I should not have given the costs over.

" Refer it to the Master to inquire if the Plaintiffs can make a good title to the allotment described in the pleadings as No. 140, so as to be able to make conveyance thereof to the Defendant *Peel*, as effectual as his present conveyance of allotment described in the pleadings as No. 139. In case the Master shall find that the Plaintiffs can make such title, let him take an account of the surveyor's charges, costs of obtaining advice, and preliminary to or in the ejectment in the pleadings mentioned, reasonably incurred by the Defendant *Peel*; declare the Defendant *Peel* entitled thereto, and also to his costs under this reference. In case the Master find as aforesaid, declare the Plaintiffs equitably entitled respectively to portions of No. 139 corresponding to those conveyed to them of No. 140, and the Defendants equitably entitled respectively to portions of No. 140 corresponding to those conveyed to them of No. 139; and let the parties, at the Plaintiffs' expense, execute mutual conveyances, conformable to the rights hereby declared, the Plaintiffs first paying the Defendants, respectively, the charges and costs to which they are hereby declared entitled; such conveyances to be settled by the Master, in case the parties differ. In case the Master find as aforesaid, let the Plaintiffs and Defendant *Peel* abide their own costs, and Plaintiffs pay Defendant *M'Kenzie* his costs of suit up to the present time. Liberty to apply, &c. In case the Master shall find that the Plaintiffs cannot make such title as aforesaid, let the bill be dismissed, with costs."



DUHIG v. SHANNON.

1864.

February 25,  
March 9.

**MR. T. A'BECKETT** moved, under 13 *Vic.*, No. 31, sec. 1, for leave to effect substituted service of the bill and writ of summons endorsed thereon, upon the agents here of two Defendants, husband and wife, out of the jurisdiction. The agents were Messrs. *Martyr, Taylor*, and *Buckland*, solicitors of the absent Defendants in a previous suit respecting the property the subject matter of this suit, and who held a power of attorney executed in reference to that suit, empowering them to receive the rents of the property in question, and bring or defend any actions or suits referring to it. The Act enables the Court to authorise substituted service "upon the receiver, "steward, agent, or other person receiving or remitting the rents of the premises, if any, the subject matter of the suit." The property in question was producing no rent at present.

The 13 *Vic.*, No. 31, s. 1, enabling the Court to authorise substituted service "upon the receiver, steward, agent, or other person receiving or remitting the rents of the premises, if any, the subject matter of the suit," does not, where the property is in fact producing no rent, authorise substituted service upon an agent empowered to receive the rents of the property in question.

**MR. JUSTICE MOLESWORTH :—**

This is an application made under the Act, and the case must therefore be brought strictly within it. The power of attorney may probably be sufficient to authorise the Court to order substituted service independently of the Act; but I do not think I can grant the application as under the Act. I cannot, I think, infer from the words "if any," that when there are no rents to be received or remitted, the Act will authorise substituted service upon the agent.

Upon a motion under the general jurisdiction of the Court, leave was given to substitute service of the bill and summons upon an agent under power, who was empowered by the Defendant to receive the

*Application refused.*

rents of the property the subject matter of the suit, and bring or defend any actions or suits referring to it.

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 DUBIG  
 v.  
 SHANNON.  
 March 9.

On this day leave to substitute service upon Messrs. *Martyr, Taylor, and Buckland*, was granted upon a motion under the general jurisdiction of the Court upon the authority of *Hobhouse v. Courtney* (f), and *Hornby v. Holmes* (g).

(f) 12 Sim.. 140.

(g) 4 Hare, 306.

### MURPHY v. MARTIN.

March 10.

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**I**NJUNCTION suit to restrain the Defendant from proceeding to a sale advertised by him of the furniture, stock-in-trade, and fixtures of the Plaintiff, under a bill of sale, and to have the bill of sale rectified, on the ground that the Plaintiff had signed it without reading it, and that it did not represent the agreement of the parties, or at all events the intentions, expressed at the time, of the Plaintiff.

a right to a time for payment which the others do not give, the Court will give to the whole that meaning as to time which is given by the one document only.

If a creditor think fit to get a new security, whatever its force, he will not, in a Court of Equity, be allowed to use it and at the same time enforce all his antecedent rights.

*A.* borrowed from *B.* £200 for three months, at interest, at 10 per cent. per annum, and executed a bill of sale of all his furniture to *B.*, conditioned to be void on payment on demand of £200 and interest at 10 per cent. per annum. On the same day *A.* gave to *B.* his, *A.*'s, acceptance at three months for £205. During the currency of the acceptance *B.* demanded payment of the £200, and interest to the time of such demand; and, on non-payment, seized the furniture under the bill of sale, and advertised its sale. *A.* then tendered to *B.* £200 and interest, conditionally on the bill of sale and acceptance being given up, which was refused. *A.* then filed his bill against *B.* for an injunction to restrain the sale, and for rectification of the bill of sale, and obtained an *ex parte* injunction. On motion to dissolve the injunction,

*Held*, that the Defendant should not be allowed to take the acceptance and use it as his own, and at the same time enforce immediate payment under the bill of sale; that although the Plaintiff did not make a strictly legal tender, there had been a substantial, proper, and adequate offer of payment, and one sufficient to induce the Court to interfere by injunction and restrain the sale.

A notice of motion to dissolve an injunction should be directed not only against the writ of injunction, but also against the order of the Court under which the writ was issued.

The case made by the bill, so far as material to the present motion, was as follows:—On 3rd February Plaintiff and Defendant agreed that Defendant should lend the Plaintiff £200 for three months, at the rate of 10 per cent. per annum interest, on the Plaintiff giving to Defendant Plaintiff's acceptance for that sum, payable, with interest, at three months. On the following day the parties met, and Plaintiff gave to Defendant Plaintiff's acceptance, dated that day, for the sum of £205, payable at three months after date. After the acceptance was given, the solicitor of the Defendant produced a bill of sale of the Plaintiff's furniture and stock, and required Plaintiff to execute it "as additional security for the said loan of £200." Plaintiff had not agreed to any bill of sale, or heard of one before in the transaction; and he asked what were the contents of the document produced. The solicitor said it was "a simple bill of sale in the usual form, securing the due payment of the acceptance so just then given by Plaintiff to Defendant." Relying on that statement, Plaintiff executed the bill of sale without reading it; and Defendant gave Plaintiff a cheque for £200, which was honored. On the 24th February, Defendant's attorney delivered personally a written demand, on behalf of Defendant, for payment of £200, and £1 0s. 9d. interest, "which sums are secured by a bill of sale," &c. Plaintiff repudiated altogether the right of Defendant to require repayment of the £200 before the expiration of the three months. On the 27th February Defendant put three bailiffs in possession of the Plaintiff's furniture, stock-in-trade, and fixtures. The bill of sale having been registered, Plaintiff obtained a copy, and, for the first time, found that it was conditioned to be void on payment *on demand* of £200, and any other sums which might become due, and interest for the same in the meantime at the rate of 10 per cent. per annum, and that it empowered the Defendant to sell the goods, chattels, and effects described in it, if Plaintiff did not, on demand, pay the said sum of

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v.  
MARTIN.  
—  
*Statement.*

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v.  
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—  
*Statement.*

£200, and such other sums as aforesaid. The bill averred that the Plaintiff never knew the contents of the bill of sale till he thus obtained a copy; and never agreed to, or gave instructions for, such a bill of sale; but believed the solicitor's statement that the bill of sale was simply to secure payment of the acceptance for three months at maturity, and had he believed otherwise, he never would have executed the bill of sale. To diminish the injury Plaintiff was suffering from having bailiffs in his place, he on the 27th February tendered to them in gold £211 (being 5s. more than they said they were required to demand), on the bill of sale and acceptance being given up; but the bailiffs said they could not give up the bill of sale and acceptance; and the Defendant's solicitor said the acceptance could not be given up, as it was then in the bank. The Defendant had advertised in the *Argus* the sale, on a day named, of the goods seized by the bailiffs. The Bill submitted that the sale should be restrained; that it was not competent for the Defendant, by such sale, to enforce payment of the loan till default made in meeting the acceptance at its maturity; and that the bill of sale ought to be rectified accordingly; but offered, for peace sake, to pay the £200, with the interest due, on having the bill of sale given up, and prayed for an injunction, and for rectification, if necessary, of the bill of sale.

On the 2nd instant an ex-parte injunction was obtained restraining the Defendant from selling, or causing to be sold, the property of the Plaintiff comprised in the bill of sale, as advertised.

The Defendant now moved, on notice, to quash the writ of injunction, on the grounds (1) that *Murphy* (Plaintiff) is justly and truly indebted to *Martin* (Defendant) in £200, and interest thereon, at £10 per cent. per annum, from 4th February; (2) that *Murphy*, or any person for him, made no tender of the amount due to *Martin* by virtue of the bill of sale, at a reasonable and proper time, or at all.

Mr. *Atkins* and Mr. *J. W. Stephen*, for the Plaintiff, objected to the notice of motion, that it attacked the writ of injunction only, and not the order of the Court under which the writ was issued.

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v.  
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—  
*Statement.*

The COURT allowed the objection to be good, but also allowed the notice of motion to be amended, as the circumstances of the motion, and the grounds stated in the notice, precluded all chance of prejudice to the Plaintiff through amendment.

Affidavits had been filed on behalf of Defendant in support of his motion to dissolve the injunction, which went to show that the acceptance was given after the execution of the bill of sale, and receipt of the Defendant's cheque; but they did not show the giving of the bill of sale, and the giving of the acceptance, were not all one transaction; and they showed that, though the cheque received by the Plaintiff was for £200, the acceptance given by him was for £205, which amount included, apparently, interest for forbearance during an intended credit of three months' duration.

Mr. *Chapman*, for the Defendant, in support of the motion.—It is admitted that the giving of the acceptance was a later transaction; but such later transaction did not satisfy the debt due on the former one, or give, as a new term of the arrangement, a credit during which the bill of sale could not be enforced. *Drake v. Mitchell* (*h*), *Curtis v. Rush* (*j*). The bill of sale was valid and binding, and the alleged tender was invalid, because clogged with a condition—one, moreover, which Plaintiff knew the bailiff could not comply with under the circumstances—that the acceptance should be given up.

*Argument.*  
—

(*h*) 3 East, 251.

(*j*) 2 Ves. & B., 416.

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 MURPHY  
 v.  
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 —  
*Judgment.*

Mr. *Atkins* and Mr. *J. W. Stephen*, for the Plaintiff, *contra*,  
 cited *Jones v. Smith* (*k*).

MR. JUSTICE MOLESWORTH :—

There is some question whether the bill of sale expressed the true intention of the parties. The Plaintiff probably knew some bill of sale was in preparation, but not exactly what sort of bill; and when that bill was presented to him rather unexpectedly for execution, he had not the advantage of professional advice, and, perhaps, complied with the necessity of executing it without examining it, because he felt that he must pay for the accommodation he was to get, and not thinking that it would operate in such a way that if the Defendant should afterwards do what he did, the Plaintiff would be bound by it according to its now apparent terms. This is a state of things under which the instrument executed by the Plaintiff would probably be rectified by a Court of Equity, if that were sought. But, without going so far as that in this case, it is sufficient here to say that Courts of Equity so regard documents given coterminously, and in one transaction, that if one of them fixes a date, and thereby gives a right to a time for payment which the others do not give, the Court will give to the whole that meaning, as to time, which is given by the one document only. This principle applies where the documents are coterminous; but if the affidavits on behalf of the Defendant are to be regarded as showing that the documents were not coterminous, but that the acceptance was given after the bill of sale, and in any way as a substitute for it, even without being in satisfaction of it, then I apprehend it must be held to operate in suspense of the liabilities under the antecedent document. If the creditor thought fit to get a new security, whatever its force, he will not—in a Court of Equity, at

(*k*) 1 Hare, 43, S. C., on app. 1 Ph., 244.

least—be allowed to use it, and at the same time enforce all his antecedent rights. At all events, he will not be allowed to enforce those antecedent rights without giving up this negotiable document. It is monstrous to suppose that the Defendant here should be allowed to take this negotiable document, pay it into a bank, use it as his own property, and obtain advantages from the bank by such use, and at the same time enforce immediate payment of the liability of the Plaintiff under the bill of sale, leaving him to what remedy, by cross-action or otherwise, he might be able to resort to, in respect of the substituted acceptance paid away by the Defendant into other hands.

Coming then to the alleged tender, I concur with the objection urged against it, that it was not a legal tender, because clogged with a condition. But, assuming that the Plaintiff did not make a strictly legal tender, it is not, according to equity, a consequence of his non-compliance with the strict requisites of a tender that he should be subject to have his property sold, and to suffer the losses consequent on a forced public sale. If he substantially offered to pay, and was really ready to pay what was due, he is not, in the view of a court of equity, to be liable to all the sacrifices incident to a forced public sale by a mortgagee in possession. The very object, indeed, of the intervention of courts of equity in such cases is to prevent and give relief against the strict enforcement of purely legal rights. In this view there has been a substantial, proper, and adequate offer of payment of the debt to the Defendant, and one sufficient to induce the Court to interfere, by way of injunction, to restrain the sale; and I think that such restraint ought not yet to be removed.

As at present advised, I think that the Plaintiff is not bound to pay till the expiration of the three months. After the expiration of that time he will not be entitled to restrain the sale, except on the terms of paying the debt.

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v.  
MARTIN.  
—  
*Judgment.*

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 MURPHY  
 v.  
 MARTIN.

*Judgment.*

As to costs, I have an impression somewhat strong, but not so strong as to induce me to vary from the ordinary rule of allowing them to abide the final result.

*Motion refused. Costs to be costs in the cause.*

February 29,  
 March 2, 14.

### LITTLE v. WILLIAMS.

*L.* being a partner in a firm of *E. M. & Co.*, by a deed of the — day of —, 1859, covenanted with *N. G.*, *R. G.*, and *J. W.*, that they should be equally entitled to his share in the partnership, and that he would hold such share in trust for them. Subsequently *N. G.*, *R. G.*, and *J. W.*, assigned all their estate

THIS was another suit arising out of the contract for the execution of the Geelong and Ballarat Railway, the various transactions and deeds in connection with which will be found fully stated in the report of the case of *Evans v. Guthridge* (l).

The bill in the present case was by *Wm. Little*, *N. Guthridge*, *R. Guthridge*, and *J. Webb*, as Plaintiffs, against *Wm. Williams* as sole Defendant. It stated that *G. S. Evans*, *W. R. Merry*, and the Plaintiff *Little*, trading under the firm of *Evans, Merry & Co.*, in 1858 contracted with the Board of Land and Works to construct the Geelong and Ballarat Railway, and a sum of £30,000 was paid into the Treasury by them, as security for the fulfilment of the

(l) 2 W. & W., Eq., 2.

to trustees for creditors, and shortly afterwards the firm of *E. M. & Co.* was dissolved, and a new partnership between *L.* and *W. W.*, under the style of *W. & L.*, established. By a deed to which *N. G.*, *R. G.*, *J. W.*, and their trustees, *L.*, and *W. W.*, and the Bank of N. S. W. were parties, *L.* covenanted that his share in the new partnership should be in trust for the persons entitled thereto under the deed of the — day of —, 1859. *L.*, *N. G.*, *R. G.*, and *J. W.*, filed a bill against *W. W.*, only for an account of the partnership of *W. & L.*, alleging that the beneficial interest of *N. G.*, *R. G.* and *J. W.*, as *c. q. t.* of *L.*, did not pass by the assignment to their trustees, and that the trustees were not interested in the accounts of the partnership. On demurrer,

*Held*, That *N. G.*, *R. G.*, and *J. W.*, might properly join *L.*, as co-plaintiffs, but that their trustees were necessary parties to the suit, inasmuch as the bill did not allege that they made no claim, but that they had no right; and the bill did not shew the latter by such clear detailed facts, as to excuse the making them parties.

*Held*, also, that an allegation in the bill that the Bank of N. S. W. had been fully paid and made no claim on the funds or parties, dispensed with the necessity of having the Bank before the Court.



contract; but that, by articles of partnership between themselves, dated December 24, 1858, it was declared that the money was brought in by *Little* only; and he contracted to bring in further capital not exceeding £50,000; the £30,000 and further advances to be, with interest, a debt of the partnership to *Little*; and that the profits of the contract should be divided in the shares—one-tenth to each, *Evans* and *Merry*, and four-fifths to *Little*. The bill stated that *Little*, in dealing with *Evans* and *Merry*, was really merely an agent or representative of the *Guthridges* and *Webb*, and other capitalists, the interests of which latter were, prior to a deed of the — day of — 1859, bought up by the *Guthridges* and *Webb*, and that by that deed between the *Guthridges*, *Webb*, and *Little*, the latter covenanted that the *Guthridges* and *Webb* should be entitled each to a third of *Little's* four-fifths of the profits, and his interest in the advance of £30,000, and the railway plant, subject to the claims of the Government and *Evans* and *Merry*, and that he, *Little*, would hold the same in trust for them; the *Guthridges* and *Webb* covenanted with *Little* to make further advances, not exceeding £50,000, and it was agreed that *Little* should have a commission of five per cent. on the profits of the *Guthridges* and *Webb*, payable upon receipt of the balance of the contract from the Government.

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v.  
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—  
Statement.

The bill then stated that early in 1860 additional capital was required for completing the contract with the Government, which the *Guthridges* and *Webb* were unable to furnish, and the Defendant agreed to advance to the extent of £10,000; and that a deed was executed, dated the 21st March, 1860, between *Evans*, *Merry*, the Plaintiff *Little*, the Defendant, the Bank of New South Wales, the co-plaintiffs the *Guthridges* and *Webb*, and Messrs. *Hawthorn*, *Whitney*, and *Copeland*, to carry out this agreement. The contents of this deed were stated as follows:—A recital that by cotemporaneous articles of agreement be-

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 —  
 Statement.

tween the Government, *Evans, Merry*, the Plaintiff *Little*, and the Defendant, the latter, so far as regarded the rights and liabilities of the Government, was substituted for *Evans* and *Merry* in the contract of 1858; a recital that £45,000 was the then present amount of the per-centages retained by the Government out of the moneys earned under the contract; a covenant that the partnership between *Evans, Merry*, and *Little*, should be dissolved; a covenant that the Bank of New South Wales should pay or supply *Little* and the Defendant with funds to pay debts and liabilities of the dissolved partnership specified, and should supply to *Little* money to make certain monthly payments, should give time until the completion or the previous determination of the contract, for the payment of debts due to it by *Evans, Merry*, and *Little* specified, and all advances which might be made by it, as therein provided; a covenant that the Defendant and *Little* should, on the completion or previous determination of the contract, pay the bank such sums as aforesaid; a covenant that the bank should, if required by the Defendant and *Little*, carrying on the contract, provide funds to meet specified bills drawn by *N. and R. Guhridge* upon *Evans, Merry & Co.*, due, some about August, 1860, others about December, 1860; and that the bank should have a first charge or lien on the per-centages to be retained by the Government subsequent to the date of the deed for the same funds; a covenant that the Defendant should become a partner with *Little* for the purpose of completing the contract, and should lend to such new partnership £10,000 at interest, and the Defendant and *Little* be entitled to the future benefit of the contract (after repaying the £10,000) and its profits, in the proportions—the Defendant one-fourth, and *Little* three-fourths; a covenant that the share of *Little*, subject to his five per cent. commission, should be in trust for the persons entitled thereto, under the said indenture of the — day of — 1859; a covenant that the plant and effects then upon the railway, or used in the construction thereof, or

works, should be valued, and an assignment thereof should be made to the Defendant, and the amount of such valuation should, on the completion of the contract, less such of the specified debts and monthly payments as should have been paid by the Defendant and *Little* to the bank under the provisions thereinbefore or thereafter contained be paid by the Defendant and *Little* to *Hawthorn, Whitney, and Copeland*, as trustees of the estate of *N. and R. Guthridges & Co.*; a covenant that the Defendant and *Little* should pay specified other bills, and debit the amount thereof either to the firm of *Evans, Merry, & Co.*, or to *Evans, Merry*, or the firm of *N. and R. Guthridges & Co.*, and on the settlement of accounts the same should be allowed, according to such debit, without prejudice to the rights or liabilities of the respective parties to the said bills as between themselves or their respective estates; a covenant that the interest of *Hawthorn, Whitney, and Copeland*, and of the *Guthridges* and *Webb*, in the sum of £45,000, percentages then already retained by the Government, should be charged with the costs of that deed, and then be subject to the trusts thereafter contained; a covenant that, in the construction of the covenants therein contained, the completion of the contract should be understood to mean the time when the said £45,000 should become payable by the Government; assignment by *Evans, Merry, and Little*, with the consent and by the direction of the *Guthridges* and *Webb*, to *Hawthorn, Whitney, and Copeland*, of all the share, interest, &c., of them and each of them, in the £45,000, and of all sums of money which should thereafter become payable under the contract in respect of the premises thereby expressed to be assigned, to hold upon trust to receive the interest of the £45,000, and pay the same equally among the *Guthridges* and *Webb* for the maintenance of themselves and families, and subject thereto upon trust, to pay *Little* his commission of five per cent., to which he might be entitled on the final winding-up of the accounts of the contract, in respect of any monies which *Hawthorn,*

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 —  
*Statement.*

*Whitney*, and *Copeland*, might receive under the assignment thereby made, and subject thereto, and to other payments, to retain the residue of the £45,000 and other premises thereby assigned to *Hawthorn*, *Whitney*, and *Copeland*, as trustees of the estate of *N. and R. Guthridge & Co.*; assignment by *Evans* and *Merry* to the Defendant of the shares, interests, &c., which, but for those presents, they would be entitled to under the contract, excepting thereout the percentages and monies thereby assigned to *Hawthorn*, *Whitney*, and *Copeland*, to hold for his own benefit, subject to any agreement which might be made between him and *Little*; and assignment by *Little*, with the consent and by direction of *Hawthorn*, *Whitney*, *Copeland*, *Guthridges*, and *Webb* to the Defendant of the plant, &c., for his own benefit, subject to any agreement that might be made between him and *Little*.

The bill next set out articles of partnership of the same date—March 21, 1860—between *Little* and the Defendant, containing amongst other things a recital of the last-mentioned deed; covenant that *Little* and the Defendant should be partners for making the railway until the completion of the contract; that the style of the firm should be *Williams and Little*; that its capital should be the £10,000 lent by the Defendant, and the railway plant; that the partners should be entitled to the capital and the net gain and profits of the business in the proportions—*Little* three-fourths and the Defendant one-fourth; a provision that forthwith after the completion of the contract a full account, in writing, should be made and settled of all the monies and effects belonging to, and of all the debts due from the co-partnership; and thereupon the partners should provide for the payment of the debts, including the sum of £10,000; and the balance of the co-partnership effects should be divided in the above proportions; provision that nothing therein contained should prejudice the rights conferred by the contemporaneous indenture.

The bill then stated that for some time after March 21, 1860, the construction of the railway was carried on by the firm of *Williams and Little*; that the business of the co-partnership was conducted and carried on by the Defendant and the Plaintiff *Little*, until July 8, 1861, when an arrangement was made, by which the Plaintiff *Webb* was substituted in the place of *Little*, to act equally with the Defendant in the affairs of the said partnership and of the said contract; and from the 8th July, 1861, the business of the said co-partnership was carried on by the Defendant and the Plaintiff *Webb* conjointly, until December 5, 1863, when *Little* recommenced, and has since continued to act jointly with the Defendant in the management and conduct of the affairs of the said partnership: that since March 21, 1860, large sums had from time to time been received by the Defendant from the Government on account of the contract, being progress payments on account of monies earned since March 21, 1860, and at the same time large per-centages were retained by the Government, which accumulated to a large amount; that on November 1, 1862, £59,800 had been retained by the Government in respect of per-centages under the provisions of the contract, and on that day was, without the knowledge or consent of the Plaintiffs, or either of them, received by the Defendant, and save that part was paid to the Bank of New South Wales, the Plaintiffs were ignorant of the application by the Defendant of it.

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The bill further stated that the contract had been completed, but no account of the partnership affairs of the firm of *Williams and Little* had been made; that profits to a large amount had been derived by the firm of *Williams and Little* from the carrying out of the contract, all which profits and the assets of the partnership had been received by the Defendant; that the Defendant had been requested to account with the Plaintiff *Little* for the three-fourth share of the assets and profits reserved to *Little* by the

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 —  
*Statement.*

partnership deed of March 21, 1860, and had produced certain accounts containing improper charges and errors, and declined to settle upon any other basis; that the Defendant, out of the assets of the co-partnership, had made payments to the Bank of New South Wales in discharge of its claims under the deed of March 21, 1860, and there was no sum due to or claimed by it under the said deed, or otherwise in respect of the contract; and the plaintiffs were willing to allow the defendant credit for all sums properly paid by him to the bank.

The bill then stated an indenture of the 7th February, 1860, made between the Plaintiffs, *N. Guthridge, R. Guthridge, and Webb*, of the first part, *Hawthorn, Whitney, and Copeland*, of the second part, and the creditors of the *Guthridges and Webb* of the third part, by which the *Guthridges and Webb* assigned all their real and personal estate and choses in action to *Hawthorn, Whitney, and Copeland*, as trustees for creditors, with directions to realise and convert into money with all convenient speed, divide among the creditors rateably, and pay the overplus to the assignors; and then contained a pretence by the Defendant, that, under or by virtue of the said indenture of February 7, 1860, the interest of the *Guthridges and Webb* in the contract and the proceeds and profits thereof subsequent thereto, became vested in *Hawthorn, Whitney, and Copeland*, as trustees; and that under or by virtue of the indentures of February 7, 1860, and March 21, 1860, the plaintiff *Little* became and was a trustee for *Hawthorn, Whitney, and Copeland*, of the three-fourths of the assets and profits of the firm of *Williams and Little* reserved to *Little*; but the Plaintiffs charged the contrary, and said that the beneficial interest of the Plaintiffs *Guthridges and Webb* in the then future proceeds and profits of the contract was not assigned or transferred to *Hawthorn, Whitney, and Copeland*, by the indenture of February 7, 1860, and was still vested in the Plaintiffs *Guthridges and Webb*; and that by the deed of

March 21, 1860, the Plaintiff *Little* became, and still was, a trustee for the *Guthridges* and *Webb*, of the three-fourth shares of the assets and profits of *Williams and Little*, reserved to *Little* by the partnership articles; and that, save as to *Little's* commission, the *Guthridges* and *Webb* were the only persons entitled thereto.

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The prayer of the bill was that it might be declared that the *Guthridges* and *Webb* were each beneficially interested in one-third of the capital and net gains of the partnership business of the firm of *Williams and Little*, reserved to *Little* by the deed of partnership of March 21, 1860; that an account might be taken of the dealings of the partnership of *Williams and Little*, and of the monies received and paid by the Plaintiffs and Defendant in respect thereto, and the Defendant be decreed to pay the Plaintiffs what might be found due to them.

To this bill the Defendant demurred on the following grounds:—1. Want of equity. 2. Uncertainty. 3. Want of title and interest in the Plaintiffs the *Guthridges* and *Webb*. 4. That it did not appear whether or not the Plaintiff *Little* had any interest in the subject matter of the suit. 5. Misjoinder of Plaintiffs. 6. That the interest, if any, of the Plaintiffs, the *Guthridges* and *Webb*, became vested in *Hawthorn*, *Whitney*, and *Copeland*, as trustees for their creditors. 7. Want of *Hawthorn*, *Whitney*, and *Copeland*, as parties. 8. Want of the Bank of New South Wales as a party.

Mr. *J. W. Stephen*, for the demurrer.—The partnership deed between *Williams* and *Little* defined their position as partners, and a bill might be filed by *Little* alone against *Williams* for an account of that partnership, but there is no privity between *Williams* and the *cestuis que trustent* of *Little*, so as to confer a right upon them to sue *Williams* for an account; there is, therefore, a misjoinder of Plaintiffs. This

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objection is not abolished by the *Rules of Court*. They only provide that no bill shall be dismissed by reason of misjoinder, but allowing a demurrer is not a dismissal.

The principal ground of demurrer, however, is that the interest of the *Guthridges* and *Webb* passed to the trustees, *Hawthorn*, *Whitney*, and *Copeland*, by the assignment of February, 1860. That deed conveys everything. The contract itself is property and is capable of being assigned, and the profits would follow the contract. It is a question of construction upon the deed itself, whether the contract, and consequently the profits, were assigned; and it is clear, from the deed itself, that it was the intention of the parties that those profits should be assigned. At all events, the construction of the deed of February, 1860, ought not to be decided against the trustees of that deed in their absence, and therefore, if the Court itself be of opinion that the Plaintiffs have a *prima facie* right to litigate that point, the trustees are necessary parties to the suit. *Watson v. Sawyer* (m), *Richardson v. Arthur* (n), *Mostyn v. Mostyn* (o).

The propriety of payments made to the Bank of New South Wales is questioned by the bill, the Bank is therefore a necessary party.

Mr. *Bunny* and Mr. *Webb* in support of the bill.—The demurrer admits the allegation in the bill, that the profits of the contract, after the 7th February, 1860, did not pass to the trustees, *Hawthorn*, *Whitney*, and *Copeland*. The demurrer, therefore, cannot be argued upon the assumption that those profits did pass to them. The *Guthridges* and *Webb* are, therefore, properly joined as Plaintiffs. If even the Court should be of opinion that these profits did

(m) Sup. Ct., Vic., Dec. 1862.

(o) 1 Coll., 161.

(n) Ante, p. 12.



pass to the trustees, still there is an ultimate trust in the deed of February, 1860, for the *Guthridges* and *Webb*, which would give them a sufficient interest to join as co-plaintiffs in this suit. The Defendant could not have objected to their being made co-defendants, and therefore, he cannot object to their being made co-plaintiffs, if, as here, their interest is not conflicting with that of the other Plaintiff. *Nelthorpe v. Holgate* (p), *Roberts v. Roberts* (q). This suit is properly framed as by trustee and *cestui que trust* against a stranger to the trust, and such a suit is maintainable. *Lewin on Trusts*, 686. In the analagous case of a legatee and executor joining in suing for a debt due to the estate of their testator, the bill is not demurrable; *Rhodes v. Warburton* (r), in which case the Vice-Chancellor held that an objection on the ground of the executor joining the legatee as co-plaintiff, was not one which the Defendant could take. Even if the beneficial interest in the subsequent profits did pass to the trustees, they would not be necessary parties according to the case as now presented by the Defendant, for his contention is, that he is liable to account only to *Little*, and that there is no privity between him and the *cestuis que trustent* of *Little*; and to sustain a demurrer for want of parties, the Defendant must shew that the absent person is a necessary party, according to the case of such Defendant. *Dalton v. Hayter* (s), *Seddon v. Connell* (t).

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We, however, contend that the beneficial interest in *Little's* share in the contract did not pass to the trustees; that, therefore, the *Guthridges* and *Webb* have an interest in the subject matter of the suit, and are properly made co-plaintiffs; and that the trustees have no interest and ought not to be parties. The interest of the *Guthridges* and *Webb* in *Little's* share in the contract was not of a

(p) 1 Coll., 203.  
(q) 2 Phil., 534.  
(r) 6 Sim., 617.

(s) 7 Beav., 313.  
(t) 10 Sim., 58.

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nature capable of being assigned. It consisted only of a right to an account against *Little*, which could only be enforced by a suit in equity, and an assignment of this right would be open to the objection of champerty. The assignment to trustees for creditors of the future profits of the contract, would involve the carrying on of the contract by the trustees, which being a description of trade, the assignment would be invalid. *Owen v. Boddy* (v). But here these profits, even if assignable, have not been assigned. There is no express assignment of them in the deed of February, 1860, and the general words of that deed, assigning all the real and personal estate and choses in action, will not include these profits. *Brown v. Meredith* (w), *Hill v. Paul* (x), *May v. Graves* (y), *Cowling v. Cowling* (z). Neither is there in the deed any covenant to assign after acquired property, and, without this, the after acquired profits would not pass. *Holroyd v. Marshall*, (a).

The Bank of New South Wales is not a necessary party, for it is only in any aspect a creditor of the partnership of which the accounts are sought by this bill, and it is not necessary in a suit for partnership accounts, to make the creditors of the partnership parties. Besides which, it is alleged by the bill and admitted by the demurrer, that the Bank has been fully paid and has, therefore, no interest in the suit, and is not a necessary party. *Earle v. Holt* (b).

Mr. J. W. Stephen, in reply.

*Cur. adv. vult.*

(v) 5 A. & E., 28.  
 (w) 2 Keen, 527.  
 (x) 8 CL & F., 295.  
 (y) 3 De G. & S., 462.

(z) 26 Beav., 449.  
 (a) 11 W. R., 171.  
 (b) 9 Jur., 773.

MR. JUSTICE MOLESWORTH (after stating the allegations and prayer of the bill as above set out:)—

I have to decide upon a demurrer put in to this bill, upon various grounds. The substantial question involved in this case seems to be between the Plaintiffs the *Guthridges* and *Webb* and their creditors, as to the profits of the contract since March, 1860. The deed of February, 1860, conveyed to *Hawthorn, &c.*, as trustees for creditors, the whole property of the *Guthridges, &c.*, in debts due by the Government, the plant, &c., but that could be reduced into possession only by arranging to fulfil the obligations of the *Guthridges, &c.*, to *Little*, and through him to *Evans, Merry & Co.*, the Government, and the various creditors of the ostensible partnership of *Evans, Merry & Co.*, and that partnership was then in such circumstances as to require additional capital.

The deeds of March 21, 1860, purport to arrange for the working out of the contract, and the supply of the requisite additional capital by *Williams*. It would certainly be a strange arrangement if the *Guthridges* and *Webb*, after assigning their interest in the present property of *Evans, Merry & Co.*, not contracting to give either money or labor to the future ostensible partnership of *Williams and Little*, or stipulating to be responsible for its losses, and being apparently in such circumstances as to make their stipulation to that effect of little value, should be allowed to draw the whole income of the debt then due by the Government for their maintenance, and besides have a three-fourths share in the subsequent profits. They had nothing to give to induce the other parties to the arrangement to devote time, money, and liability to work out the contract, principally for their benefit. If such be the literal meaning of the deeds, one would suspect they should be rectified for mistakes. But I cannot see my way to putting

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such a literal meaning upon the language of the deed of arrangement, March 21, 1860, as set out in the bill; and dealing with the seventh point of the demurrer, that *Hawthorn, Whitney, and Copeland* are not parties to the suit, I should clearly concur with the Plaintiff's construction before I dispensed with them as parties.

The bill does not purport to set out the deed of March 21, 1860, *in extenso*, or allege that it sets out its substance so far as is material for the objects of this suit. It contains a charge that the Plaintiffs the *Guthridges* and *Webb* are entitled, as against the trustees for their creditors, to the profits since March, 1860; and it has been argued that the demurrer admits the truth of the charge. But the deed of February, 1860, expressly conveyed that which I think, impliedly as between the parties to it, divested the *Guthridges, &c.*, of the future profits of the contract, until the trustees made an arrangement with the others interested with the *Guthridges, &c.*, to carry it on, and such arrangement could only revive the interest of the *Guthridges, &c.*, by express stipulation. I think that the bill, to save it from the objection for want of parties, should definitely show this view. I think the charge is not available, being merely a conclusion of law, unless sustained by facts set out. The charge is, not that *Hawthorn, &c.*, make no claim, but that they have no right, and the bill should show the latter by clear detailed facts, to excuse the making them parties.

This bill is a very unusual attempt by a person who, according to one construction of a doubtful deed, is a trustee for the *Guthridges, &c.*, and by another for their assignees, joining the *Guthridges, &c.*, as co-plaintiffs, and not making the assignees parties, to procure from the Court a declaration deciding the doubtful point against the assignors. The contents of the deed, as set out, would

make me think *Hawthorn, &c.*, proper parties. Irrespective of this question of the profits subsequent to March, 1860, I should infer that the rights of retainer by the Government, during the progress of the works, would so mix the claims of parties entitled to profit before and after a fixed date, that the accounts as to one could not be taken in the absence of the others.

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As to the first ground of demurrer, I think the Plaintiffs, or some of them, are entitled to some account, prayed against by the defendant. As to the second, I think there is no uncertainty as to the Plaintiffs being entitled to some part of the relief: including the fourth ground of demurrer with this, as to uncertainty, a passage in the bill makes it doubtful whether *Little's* interest did not cease on the 8th July, 1861, but it will bear the meaning that he ceased to be, not a partner, but a managing partner, and the subsequent part of the clause seems to assert that on the 5th of December, 1863, he was reinstated in his original position; besides, anything which the first statement in the clause may be supposed to take away from him in the interval, it transfers to the co-plaintiff *Webb*. A large claim against *Williams* is for a sum received during the interval. Though fully recognising the principle that all statements are to be taken most strongly against the pleader, I think I should be carrying it too far to say that this passage makes it doubtful if the plaintiffs should have any of the relief sought.

Coupling the third, fifth, and sixth grounds of demurrer, I think that the *Guthridges* and *Webb* might properly join *Little* as co-plaintiffs; they are, at all events, his ultimate *cestuis que trustent*, subject to a charge for those creditors for whom *Hawthorn, &c.*, are trustees. *Nelthorpe v. Holgate* (c), *Roberts v. Roberts* (d). *Little* might, perhaps, as trustee

(c) 1 Col., 268.

(d) 2 Phil., 534.

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partner, have sued his co-partner, *Williams*, making none of the *cestuis que trustent* parties, and divided the produce of the suit on his own responsibility. The mistake in the frame of the suit is, I think, including some and discarding the others; and in overruling all these grounds of demurrer, but allowing the seventh, with liberty to amend, I think I shall be putting the case in a train for proper adjudication.

As to the Bank of New South Wales, I think the assertion of it having been paid off and having no further claim on the funds or parties, dispenses with the necessity of having it before the Court.

I shall allow the demurrer on the seventh ground assigned—the want of *Hawthorn*, *Whitney*, and *Copeland* as parties—and overrule it on the others; and, the success being divided, shall allow the plaintiffs to amend if they wish, without costs, making such amendment within fourteen days; if not Plaintiffs to pay costs of suit, including demurrer.

BROWN v. HEALY.

1864.

March 21.

**M**R. J. W. STEPHEN moved, on notice, for an attachment against the Defendant for contempt by an interference with the receiver appointed by the Court.

Sunday does not reckon in the computation of the two clear days notice required for a notice of motion.

There was no appearance for the Defendant.

**MR. JUSTICE MOLESWORTH:**—When was notice of this motion served?

**Mr. J. W. Stephen.**—On Friday, the 18th instant, personally upon the Defendant.

**MR. JUSTICE MOLESWORTH.**—That is not a sufficient notice for to-day. Sunday does not reckon in the computation of the two clear days notice required. Let the motion stand over till Thursday, and renew the service this day (e).

(e) *Vide* 1 Smith's Chy. Prac., 7th ed., 247.

1864.

April 14.

A special commission is necessary to take the acknowledgment of a married woman, under No. 112, s. 87, in a place where there is a perpetual Commissioner of this Court; for the power of appointing general Commissioners does not extend to this case.

IN RE MRS. EMMA SARGOOD, AND THE ACT No. 112.

**MR. T. A'BECKETT** moved, under the Act No. 112, sec. 87, for a commission to issue to a special Commissioner in London, to take the acknowledgment of Mrs. *Sargood*.

**MR. JUSTICE MOLESWORTH** :—I have some doubt whether a special commission should issue to a place where there is a perpetual Commissioner of this Court, as in London. I will consult the Chief Justice upon the point.

*Cur. adv. vult.*

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**MR. JUSTICE MOLESWORTH** :—

I have conferred with the Chief Justice upon this point, and he thinks that the power of appointing general Commissioners does not extend to this case. The order may therefore be made.



EVANS v. GUTHRIDGE.

1864.

February 29.  
March 9, 16.

IN this case the Plaintiffs, *Evans* and *Merry*, were lately ordered by the Court to pay to the Defendants, *Hawthorn*, *Whitney*, and *Copeland*, three several sums of money (amounting together to £175) for costs. Three several subpoenas and attachments had been issued against them for non-payment of those costs, and they had been arrested and now attended in custody of the officer of the Court.

Mr. *Webb*, for the Defendants, moved that the Plaintiffs be "turned over" to the custody of the sheriff.

Mr. *Holroyd*, for the Plaintiffs, *contrà*.—The Plaintiffs have been irregularly arrested, and are entitled to their discharge. A writ to attach for non-payment of costs can not issue without a separate order of the Court for such purpose. *Boschetti v. Power* (f), *Blake v. Watson* (g). Such order should also be entered. *Tolson v. Jervis* (h). No such order has been obtained or entered here.

Mr. *Webb*, in reply.—No separate order of the Court for the issue of an attachment is needed. 1 *Smith's Ch. Pr.*, 188, 226; *Dan., Ch. Pr.*, 1091. *Boschetti v. Power* was on an attachment for not answering, not for non-payment of costs. In *Tolson v. Jervis* the order not entered was the order to pay costs, not an order for the issue of the writ. Here there were orders to pay these costs, and those orders were entered.

A writ of attachment for non-payments of costs may issue from the office upon the mere production of the subpoena for costs, and an affidavit of its service and of demand and non-payment; and no order of the Court for its issue is necessary.

A party should only be discharged from an attachment for non-payment of costs upon paying, as well as the costs endorsed upon the writ of attachment, the costs of the certificate upon which the subpoena for costs was based, of the subpoena itself, and of the attachment.

MR. JUSTICE MOLESWORTH:—

It appears to be the practice in England, and I understand that the same practice is followed here, that the writ

(f) 8 Beav., 180. (g) 1 W. & W. Eq., 139. (h) 8 Beav., 364.

W. W. & A' B. VOL. I.—EQ.

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of attachment should issue from the office upon the mere production of the subpoena for costs, and an affidavit of its service, and of demand and non-payment. *Blake v. Watson* is not a decision that an order is necessary, although an order was applied for and granted in that case. My order now must therefore be, that the Plaintiffs be "turned over" to the sheriff.

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Subsequently, on payment into the hands of the sheriff of the costs for which the subpoenas had issued (£175), and of £50 to abide the judgment of the Court as to the further costs of and occasioned by the three subpoenas and attachments, the Defendant's counsel consented to the discharge of the Plaintiffs, and his Honor made an order by consent on those terms.

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March 9.  
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Mr. *Webb* now moved for the Defendants, *Hawthorn, Whitney, and Copeland*, on notice to the Plaintiffs for an order that the £175 should be paid over to the Defendants or their solicitor; for a reference to the Master to tax the costs of and occasioned by the attachments; and that the costs so taxed be paid to the Defendants or their solicitors, out of the £50 deposited with the Plaintiffs.

From the affidavits filed it appeared, that after their arrest under the attachments, the Plaintiffs tendered to the sheriff the sum of £175, being the aggregate amounts for which the subpoenas had issued, and endorsed upon the writs of attachment, but the sheriff refused to release the Plaintiffs without an order of the Court to that effect, and the Defendants refused to consent to such order except upon payment of the costs of the Master's certificates upon which the subpoenas had issued, and which were not included in the subpoenas, and the subsequent costs of the attachments.

Mr. *Holroyd*, for the Plaintiffs, now contended that these costs ought not to be paid by them, but only the costs endorsed upon the writs of attachment.

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Mr. *Webb* in reply.

*Cur. adv. vult.*

MR. JUSTICE MOLESWORTH:—

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In this case there were three several orders for costs against the Plaintiffs, and three subpoenas for costs were issued, which subpoenas do not embrace the costs of the certificates upon which they were issued, nor the costs of themselves. The subpoenas for costs were served, and disobeyed, and then attachments issued for non-payment of costs. The Plaintiffs under attachment tendered the sheriff the sum for which the writs of attachment were endorsed. The sheriff hesitated about discharging the Plaintiffs, and properly; because they being attached for contempt were only to be discharged by clearing their contempt, one portion of which would be paying the costs incurred in the subsequent proceedings not included in the taxed costs endorsed upon the writs. I have consulted the Master, and I find it is not usual in the allocatur and subpoena for costs, to include the costs of the certificate upon which the subpoena is based; and of course if the person obeys the subpoena when served, and pays the money, he escapes that liability. If he does not obey it, I think he ought to pay all the costs rendered necessary by his default. The subpoena necessarily cannot comprise the costs of itself, and it appears that, according to the practice of the Court, it does not comprise the costs of the certificate. I think a party, seeking to be discharged from an attachment for non-payment of costs, should be discharged only upon paying—as well as the costs endorsed upon the writ of attachment—the costs of the certificate upon which the subpoena

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 —  
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was based, of the subpoena itself, and of the attachment. I shall therefore, in this case, direct that the £175 in the hands of the sheriff be paid to the moving Defendants, and that the £50 also in his hands be applied in payment of the costs of the three certificates, subpoenas for costs, and attachments, and also, under the circumstances, the costs of the present application; such costs to be taxed, and the overplus of the £50, if any, to be returned to the Plaintiffs.

*Order accordingly.*

THE MAYOR, COUNCILLORS AND BURGESSES  
 OF BALLARAT EAST v. SMITH AND OTHERS.

*April 11, 14.*

A Municipal Corporation established under "The Municipal Corporations Act 1863" does not represent the interests of the population of the municipality, so as to be entitled to maintain a suit to abate a nuisance existing in the municipality, but not shewn to be upon soil the property of the corporation. Such a corporation has no right to institute, on behalf of the public or any private individual, proceedings to restrain the continuance of such a nuisance.

**D**EMURRER to an injunction bill. The suit was by the borough of Ballarat East against the Managing Committee of the Ballarat District Hospital and the borough of Ballarat, to restrain the Defendants from permitting to continue a drain made by the hospital from its premises through the borough of Ballarat, with the consent of that borough, whereby the overflow of the cesspools of the hospital was discharged into the borough of Ballarat East.

The bill alleged that until recently the offensive matters produced in the hospital were discharged into large cesspools constructed within its grounds, and thence removed by night, so as to cause no nuisance. That, in 1863, the Hospital Committee obtained from the borough of Ballarat leave to construct a covered drain, by which to conduct the drainage out of the hospital grounds; but on condition that the drainage were first deodorized

proceedings to restrain the continuance of such a nuisance.

and rendered innocuous and inoffensive, and that no nuisance should in any way be created by such drainage. That, under color of such leave, the Hospital Committee made the drain, and conducted the drainage away from their own grounds, but in such a way that it became extremely offensive and a nuisance. That the Local Board of Health summoned the Hospital Committee before the district police court for the nuisance, but were defeated, because the appointment of the inspector, who was informant, was defective. That *Edwin Hale*, occupier of a house in Mair-street, brought a suit in this Court against the Hospital Committee to restrain the nuisance; and by way of compromising that suit, an agreement was entered into between the present Defendants, the Hospital Committee and the borough of Ballarat, but without the consent of the present Plaintiffs, on the terms that the Hospital Committee should construct a covered drain so as to remove the drainage beyond the confines of Ballarat, and discharge it into the Yarrowee, where it flows considerably within the borough of Ballarat East. That the drain was made according to this agreement. The bill then went on as follows:—"That at the part of the creek "into which the said overflow has been conducted as afore- "said there is little or no flow of water the said creek "being nearly always dry or filled with sludge and the "said drainage from the said hospital into the said creek "has already caused an intolerable nuisance in the neigh- "bourhood and is most injurious to the health of the "inhabitants and ratepayers of the borough of Ballarat "East and will if continued seriously depreciate the "value of property in that part of Ballarat East and the "Plaintiffs will suffer great and irreparable loss and "damage by reason of the diminution in the amount of "their rates and will be compelled to incur heavy expenses "for the purpose if possible of abating the said nuisance. "That by the use of proper disinfecting and deodorizing "appliances the overflow of the said cesspools might be

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" rendered inoffensive and it is in the power of the Defendants by a proper system of drainage to discharge the same without causing a nuisance in the borough of Ballarat East." The bill then alleged that the Plaintiffs wrote to the Defendants protesting against the nuisance, and received answers explaining the engineering reasons for the steps taken, but declining to abate the nuisance.

The bill prayed an injunction to restrain the Defendants " from permitting the said nuisance to continue and " from allowing any noxious or offensive overflow from the " said cesspools or from any part of the grounds of the " said hospital or from the said drain passing through the " area of the borough of Ballarat as aforesaid to be discharged into any part of the present channel of the said " creek within the limits of Ballarat East or into any " other part of the said creek so as to become a nuisance " to the inhabitants of such last-mentioned borough."

The managing committee of the hospital demurred to the bill on the following grounds — "(1) Want of equity. " (2) It does not appear what interest right or property in " law the Plaintiffs have to the land or soil or place in which " the nuisance in the bill mentioned is alleged to exist " (3) It does not appear that the Plaintiffs have any right " to institute proceedings on behalf of the public or any " private individual. (4) If the nuisance is a public " nuisance, the Attorney-General is a necessary party to the " bill. (5) If the nuisance is a private one it does not " appear that the Plaintiffs have any property interest or " right in the ground where the nuisance is alleged to exist " and it does not appear that any injury cognizable in equity " is done to the Plaintiffs or any other individual. (6) For " aught that appears by the bill the permission to conduct " the drain to the spot where it is conducted was given by " the parties having the sole authority to grant such permission. (7) For aught that appears by the bill there

"are no inhabitants or residents or dwellings or people  
"residing at or near the spot where the nuisance is alleged  
"to exist. (8) For aught that appears by the bill the  
"Plaintiffs have the power of remedying and abating the  
"alleged nuisance and it appears that the Plaintiffs have  
"acquiesced in the making of the drain. (9) It does not  
"appear in what right or character the Plaintiffs sue and  
"they are debarred by delay from obtaining relief."

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Mr. *Bunny* for the demurrer.—The bill does not shew any right in the Plaintiffs, and is therefore demurrable. *Miford on Pleading*, 179. There is no allegation that the Plaintiffs constitute the Corporation of Ballarat East, and this is necessary to shew in what capacity they sue, which must be shewn by the bill. *Banks v. Carter* (j). A corporation in suing must allege its existence and the limits of its jurisdiction, and set out its title to sue. *Mayor &c., of Carlisle v. Blamire* (k), *Mayor &c., of London v. Levy* (l). The bill should also shew that the Defendants are the persons liable to be sued. By 11 Vic., No. 59, s. 3, all suits against any hospital are to be brought against the treasurer. Here the managing committee and not the treasurer are sued. If the drain complained of is in fact a nuisance, proceedings for its abatement should be taken under the "Health Act," 18 Vic., No. 13, s. 8. It is uncertain in the bill whether this is treated as a public or a private nuisance, and whether the Plaintiffs complain as owners or as conservators. If a public nuisance, the Attorney-General is a necessary party. In *Crowder v. Tinkler* (m), Lord *Eldon* says: "Where the subject of complaint is matter of public nuisance, the Attorney-General alone can sue." In *Soltan v. De Held* (n) it was laid down that a bill might be filed to restrain a public nuisance without making the Attorney-General a party, if the plaintiff sustained special damage

(j) 12 Jur., 366.  
(k) 8 East., 487.  
(l) 8 Ves., 398.

(m) 19 Ves., 621.  
(n) 2 Sim., N. S., 133.

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 —  
*Argument.*

from the nuisance, but here no special damage is alleged. There should in any case be an allegation that there are inhabitants adjoining this drain to whom it is a nuisance. The damage alleged in the bill is too remote. *Haines v. Taylor* (o), *Johnstone v. Hall* (p). Upon the question of delay, the cases of *Attorney-General v. Sheffield Gas Consumers Company* (q) and *Oriental Steam Company v. Briggs* (r) were cited.

Mr. J. W. Stephen and Mr. Webb for the bill. It is unnecessary to allege the incorporation of the Plaintiffs, for by "*The Municipal Corporations Act 1863*," sec. 24, the inhabitants of the borough are created a body corporate, and this being a public Act, is unnecessary to be pleaded. *Dwarries on Statutes*, 665. As to the argument that these proceedings should be taken under the "*Health Act*," this bill may be treated as a proceeding under that Act, for by sec. 4 the municipal authorities are constituted the local board of health. Upon the general equity of the Plaintiffs, Counsel relied upon the provisions of "*The Municipal Corporations Act 1863*," and also cited *Walter v. Selfe* (s), *Dawson v. Paver* (t), *Soltau v. De Held* (v), and *Wood v. Waud* (w). In support of the contention that the Attorney-General was not a necessary party *Soltau v. De Held* and *Sampson v. Smith* (x) were relied on.

Mr. Bunny in reply.

*Cur. adv. vult.*

(o) 2 Phil., 209.  
 (p) 25 L. J., Chy., 462, S. C.,  
 2 K. & J., 414.  
 (q) 3 De G. M. & G., 304.  
 (r) 31 L. J., Chy. 241.

(s) 4 De G. & S., 315.  
 (t) 5 Hare, 415, 434.  
 (v) *Ubi supra*.  
 (w) 3 Exch., 748.  
 (x) 8 Sim., 272.



MR. JUSTICE MOLESWORTH :—

The first question which presents itself in this case is whether the Plaintiffs are a body qualified to represent the persons actually sustaining an injury from this alleged nuisance. Generally speaking as to nuisances every individual who is specially injured by a nuisance may individually seek redress. If three or four individuals suffer from a parallel inconvenience resulting from the same cause, they cannot join in seeking redress, but must each proceed singly. But if a great number of persons are affected, so as to constitute a public nuisance, redress then lies in the hands of the Law Officers of the Crown. The question here is whether such a municipal body as the Plaintiffs have a right to be heard upon the subject.

There is one aspect in which the right of the corporation to interfere in this case has been presented, namely, that the nuisance is calculated to inflict injury upon all property in Ballarat East, and deteriorate the value of that property, and that the present Plaintiffs are interested in preventing such deterioration. That argument I cannot accede to, that a body which has the duty of levying public rates to be applied for public purposes shall complain that by a certain deterioration of the property of the individuals liable to those rates they are injured. If such a case could be at all made out there must be an averment that the injury is such as to reduce the persons liable to payment of rates to a state of insolvency, and render it impossible for the corporation to levy money for any purposes.

I shall proceed, then, to deal with the case on the only ground upon which I think it debateable, viz., that there are some duties cast upon the Plaintiffs which will be rendered more onerous by reason of this nuisance. The bill states that the present Plaintiffs will be forced to incur a great outlay to do away with the inconvenience, if it can in

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OF BALLARAT  
EAST  
v.  
SMITH.  
Judgment.  
April 14.

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 MAYOR, &c.  
 OF BALLARAT  
 EAST  
 v.  
 SMITH.  
 Judgment.

any way be done away with, so that the question is as to their liability to incur expense. The only clauses in the "*Municipal Act*," No. 184, to which I have been referred as bearing at all upon the subject, are those as to sewerage, &c., between sections 801 and 807 ; but I find no provision in any of those clauses which imposes upon the corporation the duty of removing any inconvenience such as is here complained of. Towards the close of the Act there is a provision in section 378 that "the council may direct any prosecution for any public nuisance whatsoever created, permitted or suffered within the borough." That clause is not, I think, at all applicable to a case such as the present, but relates to proceedings in the form of prosecutions, which, of course, would be in the name of the public prosecutor. I therefore find nothing in the Act under which these corporations are at present regulated authorising their interference in such a case as the present.

I have then been referred, as bearing upon the subject, to the "*Health Act*," and it is alleged that under the provisions of that Act the corporation may incur expenses with reference to the suppression of nuisances. The "*Health Act*," however, only relates to localities which the Governor may from time to time by proclamation direct to be brought under its operation ; and there is no averment in this bill that Ballarat East ever has been brought under the operation of the Act. Probably that objection might be removed by a trivial amendment, and I have therefore to consider how the case would stand, assuming the "*Health Act*" does apply to Ballarat East. It is to be assumed here that the noxious deposit complained of takes place upon somebody's property, not property belonging to the corporation, but within the locality of Ballarat East. The only clauses, then, that I find bearing upon this subject are the 4th and the 18th. In the first place the 4th clause does not exactly make the corporation of Ballarat East the local board of health, for the expression is "the council of any municipal

district shall be the local board of health," and the council is a part only of the corporation. Assuming, however, that the duties imposed upon the council are imposed upon the corporation, there being a provision that the expense is to be defrayed out of the corporate funds, and thus getting over the difficulty that the council is not the corporation, we come then to the 13th section, which says, "The local board of health shall cause to be drained, cleansed, covered, or filled up all ponds, pools, open ditches, sewers, drains, and places containing or used for the collection of any drainage, filth, water, matter, or thing of an offensive nature, or likely to be prejudicial to health. And they shall cause written notice to be given to the person causing any such nuisance, or to the overseer or occupier of any premises whereon the same exists requiring him, within a time to be specified in such notice, to drain, cleanse, cover, or fill up any such pond, pool, ditch, sewer, drain, or place, or to construct a proper sewer or drain for the discharge thereof, as the case may require; and if the person to whom such notice is given fail to comply therewith, the said local board shall execute the work mentioned or referred to therein at the expense of the party to whom such notice was given. The said local board may, however, if they see fit, order that the whole or a portion of the expenses incurred in respect of any such last-mentioned work be defrayed out of the funds from which it is hereinbefore provided the expenses of this Act are to be defrayed."

Now, assuming that there is a deposit of filth on some portion of Ballarat East, the course to be pursued according to this section would be for the corporation or the council of the corporation to call upon the person on whose premises that inconvenience exists, to remove it, and in case he did not remove it, then to make him pay the expense of removing it. The Act gives power to the corporation to proceed against the persons causing the

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 OF BALLARAT  
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 v.  
 SMITH.  
*Judgment.*

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OF BALLARAT  
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SMITH.  
*Judgment.*

nuisance, but I apprehend that could only apply to persons within the limits of their jurisdiction, and not to persons without that jurisdiction causing a nuisance within it. In proceeding under the Act, the council have a discretion of not compelling the person on whose land the nuisance exists to be at the expense of its removal. They may at their discretion pay the expense themselves; and it might be considered a harsh proceeding where the noxious matter complained of was brought upon property against the will of the owner, to compel him to bear the expense of the removal. On the other hand the council might require him to pay the expense of removing it, and leave him to his remedy over against the persons who brought it there, and I cannot assume that the council would adopt the opposite course so as to bring the case within this bill, as for that purpose the expense of removal must necessarily fall upon the corporation.

For these reasons I think that the present Plaintiffs do not represent the interests of the population of Ballarat East, so as to be entitled to maintain the present litigation. Applying that view, then, to the particular grounds of the demurrer, there is first the general demurrer for want of equity, and I think that is sustained. As to the second ground, the Plaintiffs are, in fact, only a corporation, within whose locality a nuisance exists, but they shew no right to the soil on which that nuisance occurs. Upon the third ground, I would say that I do not think the Plaintiffs have any right to institute these proceedings. Upon the first three grounds of demurrer I allow the demurrer, with costs, not expressing any opinion as to the subsequent grounds.

*Demurrer allowed, with costs.*

PALMER v. BRONCKHORST.

1864.

May 19.

THIS was a suit for specific performance of an agreement entered into between the Plaintiff and the Defendants *Bronckhorst, Smale* and *Duerdin*. On the cause coming on for hearing it appeared that the bill was not verified as required by the *Supreme Court Rules*, cap. vi., sec. 12, as against the Defendant *Duerdin*, who had left the suit undefended.

An affidavit verifying the bill as against a Defendant, who has left the suit undefended, is necessary though no answer be required from such Defendant; and such affidavit should generally be made by the Plaintiff himself.

Mr. *Atkins* and Mr. *Bunny* for the Plaintiff. The rule has no application to a case in which the bill is proved against other Defendants, nor to a case in which, as in the present, no answer has been required from the Defendant leaving the suit undefended. We ask no relief against the Defendant as to whom no decree can be made. He is merely a formal party.

Mr. *Laves* for the Defendants *Bronckhorst* and *Smale*.—The Defendant *Duerdin* will be bound by the decree, and the bill must therefore be verified as against him.

During the argument an affidavit in the following words was filed by the Plaintiff, sworn to by his solicitor:—"That I have read through the annexed original bill in "this suit, and that the statements therein are true." This affidavit was relied on by the Plaintiff as a compliance with the rule.

MR. JUSTICE MOLESWORTH.—I am unwilling to introduce a lax practice by accepting this affidavit as sufficient. The rule properly construed requires that the Plaintiff should himself verify the bill, unless owing to his absence or to the facts stated being more immediately in the knowledge of others, the affidavit of some other person is necessarily

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v.

BRONCKHORST

*Judgment.*

or properly substituted. The Defendant *Duerdin* being a party to the suit I cannot make a decree affecting his rights, however minutely, without having the bill verified against him. The case must stand over for the Plaintiff's affidavit.

## KNOX v. POSTLETHWAITE.

*May 21.*

Permanent absence from the colony resulting in injury to the trust estate, is a sufficient ground for the removal of a trustee, although the testator may have known of such permanent absence when appointing him a trustee.

THIS was a suit seeking the removal of *James Postlethwaite* from the office of trustee under the will of *William Postlethwaite*, deceased, and that a new trustee might be appointed in his place, and another in the place of *John Bakewell*, a trustee under the same will, who had never acted and had disclaimed. The widow of the testator, who had married again, and his infant child, the *cestuis que trustent*, were Plaintiffs by their next friend. *James Postlethwaite*, *William Morton*, the acting trustee, and *John Holles Knox* were the original Defendants, and *John Postlethwaite* and *Thomas Postlethwaite* beneficially interested contingently upon the death of the infant Plaintiff, under age, were added as Defendants by amendment. It appeared that the testator had died in Victoria, where his property was situated; that *Morton* only had proved and acted in the trusts of his will, and that *James Postlethwaite* was residing in England and had never visited this colony, nor did he contemplate doing so. The testator's property had been sold and the proceeds invested. A sum of about £9100 having become due upon one of the securities payment was refused unless *James Postlethwaite*, as co-trustee with *Morton*, concurred in the receipt. He had accordingly been requested by *Morton* to concur or to disclaim the trusts of the will, but had refused to take either course, suggesting, in reply, the transmission of trust moneys to England for investment there, and the conversion of the

present suit into one for administration. The £9100 had consequently been deposited in a bank until it could be paid to persons competent to give a receipt, and interest had been lost. The Defendant *James Postlethwaite* had answered at great length, setting out the correspondence which had taken place between him and *Morton*, and asserting his right to continue as trustee. The Defendants, added by amendment, put in a similar answer, and the other Defendants left the suit undefended. The will provided for the appointment of new trustees in case any trustee "should die or be unwilling or incompetent to execute the trusts." A previous application to the Court for the appointment of a new trustee in the place of *Postlethwaite* under "*The Trustees Act, 1856*," had been unsuccessful (y).

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Statement.

Mr. *Holroyd* for the Plaintiffs.—Although *James Postlethwaite* expresses his willingness to act by the answer he has hitherto refused to act when requested to do so. Permanent residence abroad and his refusal to act are sufficient grounds for his removal. In the events which have happened a personal discretion in the application of income to the maintenance and education of an infant resident in this colony has to be exercised, and necessitates the presence in Victoria of persons by whom it is to be exercised. Absence from Victoria would not, upon the authorities, amount to "incompetency" upon which the power to appoint a new trustee would arise under the will. *Withington v. Withington* (z). It is therefore necessary to resort to the Court. *Lewin on Trusts* (a), *Finlay v. Howard* (b), *O'Reilly v. Alderson* (c), *Commissioners of Charitable Donations v. Archbold* (d), *Mennard v. Welford* (e), *Re Stewart* (f), *Iffla v. Beaney* (g).

Argument.

(y) *Vide* 1. W. & W., Eq., 173.

(z) 16 Sim., 104.

(a) 4th ed., 547.

(b) 2 Dr. & W., 490.

(c) 8 Hare, 101.

(d) 11 Ir. Eq. Reps., 187.

(e) 1 Sm. & Giff., 426.

(f) 8 W. R., 297.

(g) 1. W. & W., Eq., 110.

1864.  
 KNOX  
 v.  
 POSTLE-  
 THWAITE.  
 —  
*Argument.*

Mr. Moore for the Defendants the *Postlethwaites*.—In all the cases cited some misconduct has been alleged against the trustee whose removal was sought. In none was the trustee as in the present case—a resident out of the jurisdiction at the time of his appointment. It is shewn that the testator knew *Postlethwaite* to be residing in England when he appointed him, and the Court cannot enter into his motives in so doing or question the advisability of such an appointment. None of the contingencies contemplated by the testator as authorising the appointment of a new trustee in the place of *Postlethwaite* has occurred. *Mennard v. Welford* is disapproved of in *Lewin on Trusts*, 4th ed., p. 427, as irreconcilable with the decision in *Withington v. Withington*. The Defendant *Postlethwaite* has suggested a definite mode of administering the trust by means of an administration suit, for which purpose he advises that the bill in the present suit should be amended.

Mr. Holroyd, in reply, was stopped by the Court.

MR. JUSTICE MOLESWORTH :—

*Judgment.*  
 —

In this case a testator having property in Victoria, and a wife and children living there, appointed three persons to be trustees of his will, two of them resident here and one in England; and if all had acted a majority would have been able to administer the trust in this colony; but upon his death one of the Australian trustees disclaimed, a contingency not contemplated by the testator. For some time the sole resident trustee was practically permitted to act as he pleased, without any advice or interference from his co-trustee in England. At last, however, an inconvenience, which must in all similar cases eventually arise, arose here, when the absent trustee claimed to exercise his strict rights, and the property became unmanageable; money, which would have been available for beneficial invest-



ment, lying idle for want of the absent trustee's consent to its payment. The present *cestuis que trustent* under these circumstances come before the Court for redress, complaining of no abstract theoretical difficulties in administering the trust, but of present practical inconvenience resulting in a loss of income; trust moneys being uninvested and lying in a bank for some time without producing any interest, and, latterly, interest at a very low rate. When practical inconvenience such as this arises it is high time that the Court should interfere and take care that it shall not be prolonged. The Defendant *Postlethwaite* is not a commendable trustee; for some time he was practically useless, and only interfered for selfish reasons. He being contingently interested in remainder in the trust fund, seeking to place it under his control by an investment in the English funds; totally sacrificing the present interests of his *cestuis que trustent* to secure contingent interests of his own. By adopting a different course he might through his agents have exercised efficient control and mitigated the inconvenience of his absence. All that he has done, however, has been to suggest administration by this Court, instead of by those to whom the testator committed it, which is generally a misfortune to any estate. This gentleman's refusal to act has necessitated the suit, and costs have been occasioned by his sulky obstructiveness. I shall not, therefore, allow the Defendants their costs so far as the suit has already proceeded. In the Master's office their attendance may be beneficial in the selection of a new trustee.

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THWAITE.  
Judgment.

"Remove *James Postlethwaite* from being a trustee. Direct appointment of two new trustees in place of *James Postlethwaite* and *John Bakewell* to act conjointly with Defendant *Morton*. Order that on such appointment being made the trust funds be transferred accordingly. Declare Plaintiffs entitled to their costs, properly incurred, as between solicitor and client, including future costs. Let Defendants the *Postlethwaites*, abide their own past costs, and let all Defendants, have their future costs as between solicitor and client."

Decree.

1864.

June 2.

Motions for leave to file articles of clerkship *nunc pro tunc* should be made to the full Court.

IN RE GEORGE BERNARD CRABBE,  
AN ARTICLED CLERK.

MR. BILLING moved for leave to file articles of clerkship *nunc pro tunc*.

MR. JUSTICE MOLESWORTH.—This is a class of cases which I think should be dealt with by the full Court.

No order.

May 27, 28.  
June 9.

Conveyance set aside as fraudulent and void both at common law and under 13 *Elis., cap. v.*

Where the consideration for a conveyance, executed within sixty days preceding an order for sequestration of the grantor's estate, is the release of a debt due by the grantor to the grantee, such conveyance is a

JACOMB v. DONOVAN.

THE Plaintiff, as official assignee of *Patrick Costello*, instituted this suit to set aside a sale by the Insolvent of his equity of redemption in real estate in Melbourne to his brother-in-law the Defendant, who was in possession under a conveyance executed on the 17th July, 1863; the order *nisi* for sequestration of *Costello's* estate having been made on the 30th day of the same month. The bill alleged that the consideration expressed in the deed was "wholly inadequate;" that it was not paid, or that if paid to any extent it was by the release of a debt due by the Insolvent; and such payment avoided the conveyance under 5 *Vic.*, No. 17, sec. 8, as preferring the Defendant as a creditor under that section. All the facts material to the judgment are stated in it.

Mr. J. W. Stephen and Mr. Lawes for the Plaintiff.

"preferring" of the releasing creditor within the meaning of 5 *Vic.*, No. 17, sec. 8.

Mr. *Holroyd* for the Defendant.—As to the preference given the Defendant as a creditor there can be no preference under section 8, which is not proved to be a fraudulent preference. *Harris v. Bank of Australasia* (h). On the inadequacy of consideration he cited *Abbot v. Swooner* (j).

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—  
Argument.

Mr. *J. W. Stephen* in reply.

*Cur. adv. vult.*

MR. JUSTICE MOLESWORTH :—

June 9.  
—  
Judgment.

The bill in this case is filed by the Plaintiff, as assignee of Mr. *Patrick Costello*, an Insolvent, under a compulsory order of sequestration, dated July 30th, 1863, to set aside a conveyance of July 17th, 1863, executed by the Insolvent to the Defendant. The property consisted of houses in Melbourne, then let to tenants at more than £500 a year, now let at £612, mortgaged for £2,000, having an arrear of £150 due for interest, and was conveyed as for £400, from *Costello* to the Defendant, his brother-in-law, *Costello* being then keeping house to avoid legal process, deeply indebted, sued by his bankers on an overdrawn account, and made insolvent in less than a fortnight after. I take this price to be a great undervalue. I have the evidence of four witnesses upon the subject, two for each party. One witness for the Defendant, experienced as city valuator, values the property at a price a little under the £400; another, a valuator and estate agent, at about £450 over that sum. It seems to me that, deducting 37½ per cent. from rental, and then allowing seven years' purchase, is making double allowance for the disadvantages of this class of property. Surveyors and valuers for public

(h) 13 Moore P. C. C., 116.

(j) 4 De G. & Sm., 448.

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DONOVAN.  
—  
*Judgment.*

bodies are frequently directed to undervalue; their conclusions are not subjected to any experimental test, and I therefore would prefer the estimate of a land agent. But the first witness for the Plaintiff is an auctioneer, as it seems to me, so far as capacity goes, the best witness on prices, as his opinions are formed upon the actual result of sales, and not his speculations of value. He values the property at about £1600 over the price; another witness for the Plaintiff, an architect and surveyor, at about £2700 over. Where a dealing of this kind, as to embarrassment of grantor, near approach of insolvency, connection between parties, and price given, is presented to any mind of common sense, a strong suspicion of fraud is produced, which should be removed only by a clear statement of the history of an honest sale, reasonably probable in itself, proved by all witnesses acquainted with the facts likely to favor the grantee rather than the Plaintiff, and giving evidence consistent in itself. The witnesses for the Defendant here, are first himself, examined by the Plaintiff. Extracting facts from a very confused story, he says that *Costello* was imprisoned, not for debt, and he acted as *Costello's* agent during that imprisonment over the property in question, and was in advance to him £599; and *Costello*, released, gave him a bill for that amount, which was dishonored about May, 1863, and lying in the bank; that he applied to *Costello* several times for payment, and *Costello* paid him the amount, and he got the £599 bill out of the bank; afterwards carried it about some time, and then gave it to *Costello*; that there was interest due on it neglected; that he kept £250 of the bank-notes he got from *Costello* for some time in his strong box, not wishing to lodge them in his bank, as his account was overdrawn; that the negotiation for the purchase was carried on by a correspondence, consisting of the following letters:—

" Drummond-street,

" July 4th, 1863.

" Dear Sir,

" I have some pressing demands to meet, and must find the means by hook or by crook. I have some property in La Trobe and Cardigan streets, which is mortgaged to the Hon. *H. Miller* for £2000. There is about £150 interest due. I think the equity of redemption is worth £400, which would enable me to weather the storm. If you consider it worth that amount to you, you can have it. If I could obtain my money which is in the hands of the Government, I would not require to sell; but as I fear I will be compelled to take legal proceedings to enforce my rights with them, and wanting the money at present, I cannot wait until then. As you know the property, it is unnecessary for me to enumerate. An early answer will oblige,

" Your obedient servant,

" PAT. COSTELLO.

" *S. Donovan*, Esq., Nicholson-street, Fitzroy."

" Nicholson-street,

" July 6, 1863.

" My dear Sir,

" In answer to your note of the 4th inst., offering the equity of redemption of certain properties for the sum of £400, which you say is necessary for your immediate wants, I am sorry that recent losses prevent my placing the sum mentioned at your disposal unconditionally. The property offered I consider sufficient in value for the required amount.

" I am prepared to accept your offer, on your agreeing to pay the price of the conveying same to me.

" I am, Sir,

" Very faithfully yours,

" STEPHEN DONOVAN.

" *Mr. P. Costello*, &c."

" Drummond-street,

" July 8, 1863.

" Dear Sir,

" In reply to your note of the 7th instant, expressing your regret that recent losses prevented your placing the amount required at my immediate disposal, but that if I would incur the cost of the preparation of the conveyance, you would conclude the bargain, I have to state that I accept your offer, contingent that the matters be concluded within a week from date hereof. An early answer will oblige,

" Your obedient servant,

" PAT. COSTELLO.

" *S. Donovan*, Esq."

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—  
*Judgment.*

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JACOMB  
v.  
DONOVAN.  
—  
*Judgment.*

Returning, then, to the Defendant's account, it appears that Mr. *Madden*, a solicitor, acted on behalf of *Costello*, and prepared the conveyance at *Costello's* expense; that the Defendant employed Mr. *Lynch*, a solicitor, merely to peruse the conveyance and search the registry, to guard against prior incumbrances by *Costello*; that the conveyance was executed, *Costello*, *Madden*, *Lynch*, and himself being present, the consideration paid being the above £150, and a running bill of *Costello* to him for £150, which, at the instant of the execution, he requested might be taken as part of the consideration, to which *Costello* offered no objection. Now, this evidence presents a series of improbabilities. The correspondence, with its "Dear sirs," "Obedient servants," and formal recitals of the previous letters to be answered, makes me think that no arrangement was really effected by it, but that it was concocted to be offered as evidence. It is very improbable that a man distressed as *Costello* was, would, with so little pressure, pay the £500, and neglect to get the bill at the time of payment—would shortly after offer his property at so low a price, absolutely; and, though much pressed for money, would submit without a murmur to the deduction of £150 for a running bill. It is improbable that the Defendant, so pressed for money as not to lodge his cash in the bank, fearing it might be withheld, would be a purchaser at what he represents nearly fair value. The Defendant's dates are most confused; the bill for £150 he dates by his answer at 7th July, which would bring it into the middle of the correspondence; but in his evidence throws it nearly a month back; and this was a matter to which his attention was particularly called by the bill. Neither the bill for £500 nor that for £150 is forthcoming. The latter is said never to have been in the bank, though the Defendant was not likely to keep it idle. Mr. *Lynch* has been examined for the Defendant, and so far as he goes, agrees with his evidence, but knows almost nothing of the transaction. He saw £250 in notes paid, and a bill for

£150, of which he did not observe the date. Mr. *Madden* also present at the execution, is not examined; and, above all, *Costello* is not. For what probable reason would he not have come forward to give evidence favorable to the Defendant, if he could? The whole alleged dealing between Defendant and *Costello* presents inconsistent strictness and laxity, over-reaching and liberality. I have asked myself why, if the sale was a pretence, should not the whole £400 be paid in bank-notes? I am inclined to answer, £250 were all the notes the two parties could conveniently collect. I have also asked myself why, on the same supposition, was the price fixed so low as £400? I am inclined to answer that *Costello* expected to be examined in the Insolvent Court as to the disposal of the purchase-money. These reasonings upon the evidence make me, think that the sale was colorable, and that, although the Defendant has been ostensibly in possession since, he is really a trustee for *Costello*, subject to some claim for his own advances. I think the conveyance void at common law, and under the Act 13th *Elizabeth*. If it were real, I think that the transactions of taking up the bill for £599, the making that for £150, and the conveyance were so far contemporaneous and mixed as to be really all one, so as to make the consideration a preferential payment of part of the £599 debt, under the 8th section of the "*Insolvent Act*," and that collusive, so as to deprive it of the benefit of the opinion expressed by the Privy Council in *Harris v. Bank of Australasia*, if that is to be taken as law.

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In criminal cases, we give the accused the benefit of a doubt, and send him back unpunished upon society at large; but we should never, I think, import this sentiment into the administration of justice between individuals, and allow property to be, as we believe, unjustly withheld, because the ordering its restitution carries an imputation upon the character or veracity of the person ordered to restore. My suspicion of the unfairness of this transaction is turned

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 —  
*Judgment.*

into a strong opinion by the evidence of the Defendant himself, and the absence of other witnesses.

"Declare that the conveyance of the 17th July, 1863, in the pleadings mentioned, be deemed fraudulent and void against the Plaintiff, as official assignee of *Patrick Costello*. Order that the Defendant, when required thereto, give up possession of the premises comprised therein, or of the rents and profits thereof, to the Plaintiff, and execute a conveyance or release thereof to the Plaintiff, to be settled by the Master if the parties differ. Order the Defendant to pay the Plaintiff the costs of this suit to the present time; refer it to the Master to tax same; refer it to the Master to take an account of the rents and profits of the same premises since the conveyance received by the Defendant, and of the payments made by the Defendant for taxes, repairs, and other proper outgoings for the same premises, and of the interest paid by the Defendant to the Mortgagor thereof, and to strike a balance. Reserve further directions, and future costs.

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IN THE MATTER OF THE TRUSTS OF THE WILL OF  
 CHARLES WILLOUGHBY BARNES, DECEASED, AND  
 IN THE MATTER OF "THE TRUSTEE ACT, 1856."

June 2, 9.

A testator devised all his real estate to *B.*, upon trust for sale. Probate of another instrument purporting to be a later will of the testator was obtained. *B.* formally disclaimed the trusts of the original will.

**P**ETITION by beneficiaries under the will of *C. W. Barnes*, deceased, for the appointment of a new trustee of certain property devised to a trustee who declined to act in the trusts of the will.

From the petition, supported by affidavits, it appeared that the testator was at the time of his death seized of certain property, free from incumbrances, and also was entitled to certain other freehold property, subject to mortgages existing upon it. By his will, dated 1st of

Order made, without confirming the validity of the first will, for the appointment of a new trustee, and for vesting in such new trustee the property devised by the first will.



August, 1861, he devised all his real estate whatsoever and wheresoever to *K. E. Brodribb*, upon trust for sale and investment of the proceeds for the benefit of the present petitioners. The petition alleged that the testator died on the 17th August, 1861, without having revoked or altered his said will. On the 6th September, 1861, the testator's widow obtained probate of another instrument purporting to be a later will of the testator, but which the petition alleged not to have been validly executed by the testator. Mr. *Brodribb* formally disclaimed the trusts of the will of August, 1861, and the petitioners averred that they were desirous of testing the validity of the will by commencing actions of ejectment, but were unable to do so by reason of Mr. *Brodribb* refusing to act or to allow his name to be used in any action. The heir-at-law of the testator could not be discovered.

1864.  
In re  
BARNES.  
Statement.

Mr. *J. W. Stephen* now moved for the appointment of a new trustee, and for a vesting order vesting the property in such new trustee.—[*Molesworth, J.*—I am not aware of any instance in which a new trustee has been appointed merely for the purpose of litigating. I am inclined to think that that would savour of champerty.]—The trustee Act does not at all contemplate the object with which a new trustee is appointed, but only looks upon the order as a piece of conveyancing. A court of equity will not entertain a suit to establish a will at the instance of a person out of possession, because he can at once have the decision of a competent tribunal by bringing ejectment. In this case, however, that cannot be done without the appointment of a new trustee.—[*Molesworth, J.*—The ordinary equity would be to file a bill to compel the trustee, or the heir-at-law as constructive trustee, to allow his name to be used.]—The difficulty here is that there is no trustee and no heir-at-law. The present petitioners by applying *ex parte* put no other persons to costs, and do not prejudice any other persons by obtaining a *prima facie*

Argument.

1864.  
*In re*  
 BARNES.  
 Argument.

opinion of the Court, as this order may be granted without any expression of opinion in favor of either will.—  
 [Molesworth, J.—I feel considerable difficulty in making a vesting order transferring an estate under a will as to the validity of which there may be considerable doubt.]

*Cur. adv. vult.*

June 9.  
 Judgment.

MR. JUSTICE MOLESWORTH:—

I have felt considerable difficulty as to the applicability of "*The Trustee Act*" to a case of this kind, leaving the validity of the will totally doubtful, but still appointing a new trustee under it; but I think "*The Trustee Act*," in its provisions as to personal property, affords an argument in favor of my making such an order. The Act contemplates assignments of choses in action from one trustee to another. Now, choses in action, from their very name, may be more or less debateable, and, therefore, in the case of a transfer directed of a chose in action, the Court would not be deemed to express any opinion upon the liability of the person against whom that chose in action was to be enforced. That affords, I think, an analogy in favor of my, without confirming the validity of the first will, directing the transfer of the estate which might be held under it. In this particular case, however, I have not at present materials before me satisfying me as to the fitness of the gentleman suggested as a new trustee; and I shall require a more specific affidavit as to that. Then as to the vesting order, the property is partly subject to mortgages and partly free from incumbrances. With regard to the property of which the testator was mortgagor, no legal estate could pass to his devisee in trust; and, therefore, it would be useless for the purpose of ejectment making any vesting order as to that. I shall, therefore, confine the order

when made to those properties of which the testator was seized in fee in his own right; and as to them when I have an affidavit distinguishing them, and a further affidavit as to the fitness of the proposed trustee, I shall be disposed to make the order.

1864.  
In re  
BARNES.  
Judgment.

Upon a subsequent day, upon production of further affidavits as required by his Honor, an Order was made for the appointment of a new trustee, and vesting in him the property devised by the first will of which the testator was beneficially seized in fee at the time of his death.

AVERY v. McARTHUR.

THE bill alleged a Crown grant of an allotment of land to one *Walters*, and a memorandum of subsequent sale by him of three acres thereof to one *Butcher*, in September, 1860, and a sale by endorsement on this memorandum of *Butcher's* equitable interest to the Plaintiff in January, 1862; payment of the purchase-money by him, and that no conveyance of the three acres was executed to *Butcher* or to the Plaintiff. That *Walters* executed a legal mortgage of the whole allotment to *R. & T. Clarke* in January, 1861, who sold the same under their power of sale to the Defendant, in March, 1862; the contract of sale containing these words:—"subject to the rights, if any, of the purchasers from *Edward Walters*." The bill then alleged notice in the following terms:—"The land, &c., sold to the Defendant as hereinbefore mentioned was sold to and purchased by him with notice of sale to the

June 27, 28.

A general allegation that land sold to, the Defendant was sold to, and purchased by, him with notice of the Plaintiff's title, is not sufficient to admit evidence of notice to the Defendant's vendor; and a case against the Defendant founded on such notice cannot be raised at the hearing. Notice of the Plaintiff's equity being

proved only as against the Defendant in whom the legal estate was vested, and whose title was perfected by a registered conveyance from a mortgagee, in whom no notice was proved, the bill was dismissed, with costs.

1864.  
 AVERY  
 v.  
 MCARTHUR.  
 —  
*Statement.*

"Plaintiff hereinafter mentioned, and of the Plaintiff "having taken possession of the portion of land, and "expended money in building thereon, and also that the "Plaintiff was then in possession thereof." The bill further alleged that before the sale to the Defendant by the *Clarks* the Plaintiff had sought a conveyance from them which had been refused; and that the Defendant had obtained a judgment against the Plaintiff in an action of ejectment, which he threatened to act upon, and prayed that the Defendant might be declared a trustee for the Plaintiff of the land recovered in ejectment, and decreed to convey to him; and in the meantime be restrained from proceeding on the judgment.

The Defendant in his answer denied having read the contract under which he bought, alleged that he heard nothing of any sale to the Plaintiff until after his purchase; that he had been in possession of all the land purchased by him except a hut and yard, wrongfully held by the Plaintiff, and relied upon the registration of the mortgage to the *Clarks* and of the subsequent conveyance from them to himself. The memoranda constituting the Plaintiff's title had not been registered.

The case now came on for hearing.

*Argument.*  
 —

Mr. Moore for the Plaintiff.—The Defendant bought with direct notice of the Plaintiff's right, under the agreement which mentioned the rights of purchasers from *Walters*. He had also notice through the possession by Plaintiff of the land purchased by him. Notice through both these sources cast upon him the duty of an inquiry which would have shewed a clear title in the Plaintiff. *Attorney-General v. Lord Tremlestown (k)*, *Jones v. Williams (l)*, *Jones v. Smith (m)*, *Holmes v. Powell (n)*.

(k) 5 Ir. Eq. Reps., 1.  
 (l) 24 Beav., 47.

(m) 1 Hare, 43.  
 (n) 8 De G. M. & G., 572.

Mr. *Laures* for the Defendant.—The conduct of the Plaintiff remaining in possession for so long a time without attempting to obtain a conveyance is inconsistent with any belief in the validity of his title. No rightful possession under a clear agreement is shewn. There was nothing to distinguish the three acres sold from any other three of the allotment. *Butcher's* agreement was too vague for specific performance as against his vendor, and cannot be enforced by the Plaintiff against the Defendant. There being no rightful possession referable to a distinct agreement, notice of actual possession is immaterial. If the equities are equal as between Plaintiff and Defendant those of the latter should prevail as he has the legal estate. The registration of the Defendant's conveyance without any actual notice of rights in third persons destroys their rights as against him. *Wharton v. Greville* (o). The Plaintiff does not make any case of notice to the *Clarks*, from whom the Defendant purchased, and omitting to do so, notice to the Defendant himself is immaterial, as the *Clarks* must be assumed to be purchasers without notice, and might sell to the Defendant with notice.

1864.  
AVERY  
v.  
MCARTHUR.  
Argument.

Mr. *Moore* in reply.—That case is made by the bill in the paragraph alleging that the land sold to the Defendant was "sold to" and purchased by him with notice; by such an allegation it must be intended that the vendors had notice in selling, as well as the purchaser in buying, and notice in each is clearly charged.

MR. JUSTICE MOLESWORTH :—

Judgment.

The bill alleges that *Butcher* had an equitable title from *Walters*; that the Plaintiff purchased from *Butcher*, and acquired his equitable rights and the advantages of priority

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v.  
MCARTHUR.  
—  
*Judgment.*

of *Butcher's* purchase. The Defendant claims title under a mortgage from *Walters*, subsequent to his sale to *Butcher*, and a sale by the mortgagees to him. The case as set out by the bill shewed that as soon as *Butcher* purchased he went into possession, and also explicitly that when the Defendant purchased from the *Clarkes*, the mortgagees, he had notice of the Plaintiff's title. The bill was, therefore, not demurrable, notice by possession as against a mere grantee of the legal estate being sufficient to support it as it stood.

The Defendant relies on conveyances of the legal estate from *Walters* to the *Clarkes*, and from the *Clarkes* to himself, both registered. He denies notice in himself, and states his ignorance of *Butcher* having entered under any agreement. This possession is the only statement in the bill which is evidence of any notice to the *Clarkes*; and notice to the *Clarkes* has not been distinctly alleged or proved. Independently, therefore, of any rights conferred by registration the Plaintiff has not proved any case entitling him to relief against the Defendant, for which it would have been necessary to shew a right to postpone not only the Defendant on the ground of notice, but also the *Clarkes*, from whom he purchased. Unless he can do this the legal title must prevail. I am very far from saying that the effect of the Defendant's registered conveyances might not have been got over by the facts. There might have been a case of notice to *Clarke* made out had evidence of such notice been admissible. There is definite evidence of the Defendant seeing the Plaintiff in possession before his purchase; but I am thrown back on the difficulty that there is no notice to the *Clarkes* of *Butcher's* title distinctly proved, and that the case of notice to them has not been made by the pleadings. If the Plaintiff had intended to rely on that notice he should have so stated in his bill, and the question of notice should have been put in issue, but this has not been done.

It is the privilege of a purchaser buying without notice of a prior equitable right to sell the property purchased by him to another discharged of that equitable right, whether that other knows or is ignorant of its existence. But in some cases sales may be so conducted that the privilege which I have mentioned may be waived, and the person entitled to exercise it may sell subject to the rights of third persons; and in such a case, if the person buying had notice of prior equitable rights, such rights would prevail, assuming that the vendor had distinctly waived his privilege of defeating them. No case such as this is explicitly made here, nor would I so construe the document under which the Defendant purchased. The mention of "rights, if any," in the contract I regard as merely precluding any implied guarantee of the vendors' title, and not as relinquishing any rights which they possessed. I therefore think that on the whole the bill must be dismissed. I should have been glad if I had felt myself at liberty to have relieved the Plaintiff from the payment of costs, but do not. The bill must be dismissed with costs; without prejudice to any other suit by the Plaintiff.

1864.  
AVERY  
v.  
MCARTHUR.  
Judgment.

*Bill dismissed, with costs.*

1864.

June 14, 30.

## BAMBLET v. BAMBLET.

A testator after directing payment of his debts by his wife, disposed of his property in the following words:—"The rest residue and remainder of my worldly goods such as carts horses moneys or property of what nature or kind soever which God in his goodness hath bestowed upon me shall be for the sole use and benefit exclusively of my aforesaid wife," and he afterwards appointed her executrix.

*Held*, that the testator's real estate was thereby effectually devised.

ON a reference to the Master in an administration suit to ascertain the heir-at-law of an intestate, he reported that upon the intestate's death his real estate descended to his son as heir-at-law; and that *Charlotte Bamblet* became entitled to such real estate under the will of such heir-at-law. The will was set out in the report. The words on which discussion arose were as follow:—

"I desire that all my just debts and funeral expenses shall be paid by my wife *Charlotte Bamblet* and that the net residue and remainder of my worldly goods such as carts horses moneys or property of what nature or kind soever which God in his goodness hath bestowed upon me shall be for the sole use and benefit exclusively of my aforesaid wife *Charlotte Bamblet* and do hereby constitute appoint and ordain my wife sole executrix."

The report was excepted to by *Henry Bamblet*, not a party to the suit, on the ground that the will related solely to personal estate.

*Mr. Atkins* in support of the exceptions.—All the general words following the gift of "worldly goods" must be limited by those preceding them; and no property which would not have passed under a bequest of "worldly goods," if those words only had been used, can be affected by the present will. *Jarman on Wills*, 3rd edit., Vol. I., p. 683 to 687, and cases there cited. Those words alone will not devise lands; the maxim "*noscitur a sociis*" narrows the construction of the bequest, and the terms used, if adequate to comprise land, will be



confined to personal estate, from their association with the legatee's nomination to the executorship. *Jarman* p. 693.

1864.  
BAMBLET  
v.  
BAMBLET.  
Argument.

Mr. *J. W. Stephen* and Mr. *Lawes* in support of the report. —The expressions “sole use and benefit” are more appropriate to real than to personal estate. If the general words “worldly goods,” which are sufficient to pass real estate, are to be construed as reduced in their signification by specific enumerative words which follow, they are again enlarged by the general words with which the devise concludes. “Worldly goods” have been held to pass real estate. *Wright v. Shelton* (p), *Nugee v. Chapman* (q), *Swinfen v. Swinfen* (r), and *O'Toole v. Browne* (s).

Mr. *Atkins* in reply.

*Cur. adv. vult.*

MR. JUSTICE MOLESWORTH:—

June 30.  
Judgment.

This case comes before me upon exceptions to the Master's report, involving a question upon the construction of a will, as to whether real estate does or does not pass under it. [His Honor read the clause of the will as set out *ante* p. 80.]

The authorities upon the subject are all collected in *Jarman on Wills*, at the pages referred to in the argument. The word here used is “property.” That real estate may properly be devised by such a word I cannot better shew than by referring to Mr. *Jarman's* own words at the commencement of the twenty-second chapter, where, in his

(p) 18 Jur., 445.

(r) 29 Beav., 207.

(q) 29 Beav., 290.

(s) 23 L. J., Q. B., 282.

1864.  
 BAMBLET  
 v.  
 BAMBLET.  
 —  
*Judgment.*

introductory observations upon the subject, he speaks of the question whether real estate passes as only occurring in the absence of terms technically descriptive "of such property." The author himself there uses the word "property," as applicable to real estate, and the word appears to me to have a special application to real estate, both in common parlance and in legal language. However, there are a good many authorities in which the language of the will very nearly resembled that of the will in question in this case, and where it was held that landed property did not pass. In *Timewell v. Perkins* (t), the language is, "and all other the rest, residue, and remainder of my estate, consisting in ready-money, plate, jewels, leases, judgments, mortgages, or in any other thing whatsoever or wheresoever." Real estate was there held not to pass. The word in that case is "estate," and the tendency of the authorities has been to confine "estate" to personalty, rather than the word "property," which occurs here; and the expression "consisting in," used in that case has, I think, another meaning to "such as" used in this will, the latter expression being illustrative rather than comprehensive. In *Roe d. Helling v. Yeud* (v), real estate was excluded from a bequest of "the remainder of property whatever and wheresoever." In that case there was a direction to the executors, *quâ* executors to pay. Here the direction is that the testator's wife, without describing her as executrix, should pay. The most recent authority in favor of the restricted construction is *Doe d. Bunny v. Rout* (w), where the words approach more nearly those of this will, but the same distinction exists between that case and the present; that the general words of gift were preceded by a direction to the person named executrix, as executrix to pay debts out of the property afterwards bequeathed to her, and not as here by a similar direction to a person not in the

(t) 2 Atk., 102.

(v) 2 Bos. & P., N.R., 214.

(w) 7 Taunt., 79.

capacity of executrix, although the will subsequently appoints the person to whom such gift has been made as executrix. In that case also the enumeration of the parts of the property is more exhaustive than in the present.

1864.  
BAMBLET  
v.  
BAMBLET.  
Judgment.

The cases on the other hand are, first, the case of *Jongsma v. Jongsma* (x), in which there was a gift of "all his goods, estates, bond debts to be sold;" and it was held that the word "estates" did pass legal estate, because the word "goods" coming before had been sufficient to exhaust the personalty. In the will before me, the word "goods" precedes the word "property," and would be sufficient to exhaust all the personalty. There is on the whole a disposition in recent authorities to construe wills more liberally than heretofore in favor of passing real estate. This disposition is strongly shewn in the cases of *Dalmain v. Mosely* (y), *The Mayor of Hamilton v. Hodsdon* (z), and *O'Toole v. Brown* (a). The older cases proceeded on the principle that express words were required to disinherit the heir, whose title by descent could only be excluded by clear and distinct expressions; but in modern authorities no reference is to be found to this doctrine, which seems no longer to be acted upon. Mr. *Atkins* relied on the word "or," having been used instead of "and," as shewing that the property intended to pass was *ejusdem generis* with that already described; but I do not think that much importance is to be attributed to the use of one word as distinguished from the other. It is clear that the testator is speaking of different descriptions of worldly goods in the words which he successively uses, and the signification of addition once given, whether it be expressed by "and" or "or," is immaterial. I therefore think on the whole balance of authority, and following what appears to me clearly to have been the intention of the testator, that the words used were sufficient to include

(x) 1 Cox, 362.

(y) 1 Drew, 632.

(z) 6 Moore, P. C. C., 76.

(a) *Ubi supra*.

1864.  
BAMBLET  
v.  
BAMBLET.  
—  
*Judgment.*

real estate, and that such estate was meant to be included in and passed by the devise. I am by no means sure that if this will had come before the Judges who decided the case of *Doe d Bunny v. Rout*, they would have given the construction which I have given to it; but although that case has never been expressly overruled the current of subsequent authorities has been against it; and I think if the words in this case came before the Judges who decided the three cases of *Dalmain v. Mosely*, *The Mayor of Hamilton v. Hodsdon*, and *O'Toole v. Browne*, a decision opposed to that in *Doe d Bunny v. Rout* would be arrived at.

Upon the whole I concur with the Master, and overrule the exceptions. As, however, this is a matter of considerable doubt and difficulty, and the exceptant has been called upon to assert what he believed to be his rights in a matter litigated between third persons, I shall not order him to pay costs.

*Exceptions overruled without costs.*

McEWAN v. CLARKE.

1864.  
June 15.  
July 5.

**T**HIS was a suit brought to obtain relief against the forfeiture of a lease by nonpayment of rent; the Defendant, who had purchased the lessor's reversion, having entered into possession of the demised premises.

A lessor in possession of the demised premises under a forfeiture for non-payment of rent, is liable to account for the rents and profits with wilful default.

The bill alleged a tender of rent in arrear, and refusal; and prayed for an account of rent in arrear; also for an account with wilful default of the rents and profits of the demised premises since the Defendant had been in possession; for payment of any balance found upon such account; for possession of the premises; and for a new lease.

The answer admitted the Defendant's entering into possession, but denied that he insisted on a forfeiture for nonpayment of rent, or on keeping possession as against the Defendant, referring to a letter by which he had offered to give up possession on certain terms; and stated that upon payment of what was due to him and the costs of suit, he then was, and had always been, ready to grant a new lease or to renew the old one.

Mr. *J. W. Stephen* for the Plaintiff—The title to relief being admitted, the only questions to be determined are the terms upon which it should be given, and the costs of the suit. The lessor in possession is liable to account as a mortgagee in possession. The refusal of a sufficient tender entitles the Plaintiff to his costs. *Bowser v. Colby* (b), *Bamford v. Creasey* (c).

*Argument.*

Mr. *Bunny* for the Defendant.—The analogy between the cases of a lessee, and of a mortgagor coming to seek  
(b) 1 Hare, 109. (c) 10 W. R., 856.

1864.  
 McEwan  
 v.  
 Clarke.  
 —  
*Argument.*

relief against a forfeiture incurred, only holds so far as the costs are concerned, which in both cases are to be borne by the person seeking relief. As to the account prayed, it could never have been intended that a tenant in breach of his obligations should be permitted to abandon property, and after a long absence return and call upon the lessor, who in the meantime had resumed possession in the protection of his rights, to account to him as a trustee. During the lessor's possession his occupation will be set off against the lessee's liability to pay rent, but the lessee can obtain no further advantage. The present bill is filed after the Defendant's consent to concede all that is rightly asked by it. The Plaintiff should therefore pay costs. *James v. Biou* (d), *Millington v. Fox* (e), and *Blennerhassett v. Day* (f). No direction will be given to take an account of what might have been received without wilful neglect or default, unless a case of neglect or default is made by the bill which is not done here. *Hughes v. Williams* (g).

Mr. J. W. Stephen in reply.—This direction is of course, in directing accounts against a mortgagee in possession, and should be given here. The execution of a new lease will not be necessary. *Hoghton v. Hoghton* (h).

*Cur. adv. vult.*

July 5.  
 —  
*Judgment.*

MR. JUSTICE MOLESWORTH :—

The only question which has been discussed and which has required deliberation in this case is as to the manner in which the Defendant should be charged whilst in possession of the premises. The right of the tenant to

(d) 3 Swans., 237.

(e) 3 M. & Cr., 308.

(f) 2 Ball & B., 104.

(g) 12 Ves., 493.

(h) 15 Beav., 279.

relief in equity in cases of this kind is quite a matter of course. The subject was before me in the case of *Lyons v. Smith* (j), in which I pronounced a judgment precisely on the same principle as that which I am now prepared to pronounce. There is an absence of authorities upon the subject in the English Courts, but I have found several Irish authorities, viz. :— *Canny v. Hodgins* (k), *O'Reilly v. Featherston* (l), and *Biddulph v. St. John & Keefe* (m). Those are all authorities as to the manner in which such accounts should be decreed, and in all those cases the account of rents and profits was decreed charging for wilful default.

1864.  
MCKEWN  
v.  
CLARKE.  
—  
Judgment.

In the present case the landlord entered upon the premises, which consisted of a public-house, and thought fit to embark himself in that class of business; and it would be particularly unreasonable to hold the tenant to be entitled only to the amount of the landlord's actual receipts, he embarking in a business as to which he was previously inexperienced. I therefore think the tenant should have the option of taking the actual receipts as to which, in all probability, he can only have the Defendant's own accounts, or of having a reasonable value put upon the occupation of the premises; and the decree I am prepared to pronounce is as follows :—

"Declare that the Plaintiff is entitled to redeem the premises; "declare the Defendant subject to account for what he has received, "or for what, without wilful default, he might have received for the "premises since his entry thereon. Refer to the Master to inquire "and report the amount of rent due when Defendant entered, and "from what time; also the proceeds of the premises which the "Defendant actually received, over and above all proper expenses and "outgoings to the time of the report; also the amount the Defendant "might reasonably have procured for the premises, by letting the "same, over and above all proper expenses and outgoings to the same "time. Reserve further directions and costs."

Decree.  
—

(j) Sup. Ct., Vic., 19th March, 1861. (k) Hay. & Jo., 769.  
(l) 4 Bli., N. S., 161.  
(m) 2 Sch. & Lef., 521.

1864.

July 4, 5.

In a suit by an equitable mortgagee of real estate devised to infants, praying a sale in satisfaction of his charge, the Court has no jurisdiction under 11 G. 4, & 1 W. 4, cap. 47, to direct that the amount charged shall be raised by mortgage instead of by sale.

## WALKER v. HOGAN.

IN April, 1855, the Plaintiff sold to *William Jones* an allotment of land at Portland for £2000, and signed an agreement providing for the payment of £1000 balance of purchase-money within five years, and interest in the meantime, the purchaser being entitled under the agreement to take possession forthwith, but not to receive his conveyance until payment of the balance. The purchaser accordingly entered into possession, and died before the balance of purchase-money became due, having by his will left all his real and personal estate to trustees for his infant children equally, subject to an annuity of £100 to his widow. No powers were given to the trustees, except a power to apply the income of the infants' shares to their maintenance during minority. The trustees and executors under the will renounced, and administration, with the will annexed, was granted to the widow, who afterwards married the Defendant *Hogan*. The balance of purchase-money was not paid when due, and interest had fallen into arrear. No conveyance of the property had been executed by the Plaintiff. Under these circumstances the present bill was filed against *Hogan* and wife and the infant children of the purchaser, praying that the vendor's lien for unpaid purchase-money might in default of payment be made effectual by a sale of the property in possession of the Defendants.

Argument.

Mr. *J. W. Stephen* and Mr. *T. a'Beckett* for the Plaintiffs.

Mr. *Holroyd*, for the Defendants, asked that some facilities for raising the balance of purchase-money by a mortgage might be given by the decree, as a mortgage would be for the infants' benefit. He was not then prepared with cases in support of the application, but submitted



that on general principles the Court had jurisdiction. The larger power of sale which it was asked to exercise contained the less power of mortgage.

1864.  
WALKER  
v.  
HOGAN.

*Argument.*

Mr. J. W. Stephen consented to such an order being made.

MR. JUSTICE MOLESWORTH, doubting the jurisdiction, requested Mr. *Holroyd* to mention the case on the following day.

Mr. *Holroyd* referred to the interpretation put on 11 *G. 4* & 1 *W. 4*, cap. xlvii., sec., 11, 12 (n), in *Holme v. Williams* (o), in favor of a mortgage. The authorities against a mortgage were *Smethurst v. Longworth* (p), *Mandeno v. Mandeno* (q), and *Lewin on Trusts* (r). The Act 2 & 3 *Vic.* cap. lx., might be regarded as declaratory, and shewed an intention to include a power of mortgaging the estates of infants, in the power of sale given by the former Act, on which doubts had arisen that were determined by the later statute.

*July 5.*

MR. JUSTICE MOLESWORTH:—

*Judgment.*

Two cases have been decided in England on the 11 *Geo. 4* and 1 *Will. 4*, cap. xlvii. One, that of *Smethurst v. Longworth*, before the Master of the Rolls, Lord *Langdale*, in which he held that the Act does not empower the Court to direct a mortgage, even where the master has reported that a mortgage would be for the benefit of an infant heir. Lord *Langdale* thought the words "sale or mortgage" would naturally have been used if the Legislature had intended to authorise a mortgage of the infant's

(\*) *Ad.*, p. 627.

(p) 2 *Keen*, 603.

(o) 8 *Sim.*, 557.

(q) *Kay App.*, ii.

(r) 4th edit., p. 296.

1864.  
 WALKER  
 v.  
 HOGAN.  
 —  
*Judgment.*

estate. In the other, that of *Holme v. Williams*, the Vice-Chancellor of England, Sir *L. Shadwell*, came to the opposite opinion; but the former decision was not quoted. In England the difficulty arising on the construction of the Act has been removed by subsequent legislation; but here the later legislation has not been adopted. On the whole, I think, the earlier decision—that of Lord *Langdale*—the more reasonable; and that the power to sell given by the Act does not include a power to mortgage. I think so, looking to the nature of a mortgage, and the incidents consequent on default, and also looking to the circumstance that such default would submit an infant to the costs of two suits instead of one. It would be straining the language of the Act too far to say that “sale” included “mortgage.” There has also been a conflict of authority on the analogous question of whether a private power of sale includes a power to mortgage. A clear decision on it might have been brought to bear on the construction of the statute; but there is none. The last authority on the subject is *Page v. Cooper* (s), where the earlier decisions are noticed. I feel only authorised to direct a sale, and not a mortgage. The decree will be, for an account of what is due to the Plaintiff in the usual way, and for payment in six months; and that on such payment there be a release by the Plaintiff, or in default of payment a sale.

(s) 16 Beav., 403.

FISHER v. JACOMB.

1864.

July 8.

IN this case the Defendant, as official assignee of *Allan Fisher*, the father of the Plaintiff, had attached certain property claimed by him to belong to the insolvent, but which the Plaintiff alleged to belong to him. The case now came before the Court upon a motion by the Plaintiff for an injunction to restrain the Defendant from proceeding to sell the property in question.

Consequential damages do not constitute a case for the interference of a Court of Equity.

A bill is not sustainable for an injunction to restrain an official assignee from selling goods seized, he alleging them to be the property of the insolvent.

The case made by the bill was, that the Plaintiff having worked for several years as servant to his father, the latter became indebted to him in a large amount for wages, and in payment of the same on the 13th August, 1863, gave him a bill, payable at six months after date, which was dishonored on coming to maturity. Plaintiff then sued his father on the bill, obtained judgment, and the sheriff sold all *Allan Fisher's* chattels and interest on and in a certain farm, in satisfaction of the judgment. One *Thomas Hand* was the purchaser at £322 19s., having, in fact, bought on behalf of the Plaintiff. On the 7th May the estate of *Allan Fisher* was sequestrated, and the Defendant appointed official assignee. The Defendant, as if treating the proceedings between the father and the son as collusive, seized the property sold by the sheriff, as of the estate of the insolvent.

Mr. *Holroyd* in support of the motion.—The Plaintiff will sustain irreparable damage if the Defendant be allowed to proceed to sale. The Plaintiff has commenced an action at law to recover the property, but no damages can be given that will compensate him for losses arising from the total stoppage of the business of the farm and being disabled from putting in his crops. He

*Argument.*

1864.  
 FISHER  
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 —  
*Argument.*

has no sufficient remedy at law, and this is a case in which a court of equity can give relief, without prejudice to adverse claims. The Plaintiff would have removed the assignee's bailiff had it been an ordinary case, but in the "*Insolvent Act*" there are heavy penal consequences—three years' imprisonment—which, although in defence of his own, a man might not like to risk. The Court should grant the injunction, as the only real relief the Plaintiff can have.

Mr. *Lawes*, for the Defendant, was not called upon.

*Judgment.*  
 —

MR. JUSTICE MOLESWORTH :—

I do not think this bill sustainable. It is for an injunction to restrain an official assignee from proceeding to realise the value of goods seized, he alleging they are the property of the insolvent. The Plaintiff may have a very good case against this, and the Defendant may be ejected in case the seizure is wrongful. But consequential damages are never held to constitute a case for the interference of a court of equity. Perhaps, if we were originating the jurisdiction of a court of equity, such relief might be given; but, in point of fact, it never has interfered in such cases. In many seizures, under execution, distraint and levy, great hardship is inflicted, especially if the person levied upon is a man in narrow and struggling circumstances; yet although such cases are of every-day occurrence, there is no case on record where a court of equity has interfered, as to prevent consequential damages. In the absence of all authority upon the subject I refuse the motion; costs to be costs in the cause.

BANK OF VICTORIA v. COZENS.

1864.

June 27.  
July 14.

**T**HIS was a suit instituted by the Plaintiffs, as equitable mortgagees of real estate, praying foreclosure against the widow and children of the deceased mortgagor, some of whom were infants—the Defendants being all interested under the mortgagor's will. The memorandum of deposit, dated the 16th day of February, 1859, was, so far as material to the judgment, in the following words:—"I have this day deposited with you the documents "specified hereunder as a security," &c., "and I agree that "if I am not immediately pressed for payment of the said "debt or liability I will on demand and at my own costs "make an assurance to such bank of all the hereditaments "with the appurtenances comprised in such documents "and of all my interest therein by way of further security "for the said debt or liability with bank interest until payment such assurance to contain the usual power of "sale covenant and provision to insure and all other "proper clauses."

The proper remedy in equity, of an equitable mortgagee, is a sale and not foreclosure.

An infant foreclosed is entitled to a day to shew cause notwithstanding "The Trustee Act 1856."

The widow of the deceased obtained letters of administration, with his will annexed, and, finding the estate insolvent, placed it under sequestration. The Plaintiffs thereupon entered into possession of the mortgaged property with the consent of the official assignee and of the Defendants.

The official assignee was not a party to the suit. The infant Defendants put in the usual infant's answer; the adult Defendants left the suit undefended.

Mr. J. W. Stephen and Mr. T. a'Beckett for the Plaintiffs.—  
The Plaintiffs as equitable mortgagees, entitled to call for a legal mortgage, are entitled to foreclosure as if that mort-

*Argument.*

1864.  
BANK OF  
VICTORIA  
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COZENS  
—  
*Argument.*

gage had been executed. This right, though formerly doubted, is now generally admitted, and in a case like the present, foreclosure is the mortgagee's appropriate remedy. *Fisher on Mortgages*, 169 to 172; *Seton on Decrees*, 2nd edit., 448. Some of the Defendants being infants, we are entitled to a vesting order as to the estate, if any, vested in them; and such order may be made by the decree in the first instance, contingent upon payment not being made on the day fixed for redemption, as in *Lechmere v. Clump* (i). The decree in that case is set out in the report in the Law Journal only. The infants' right to a day to shew cause, is virtually at an end under the provisions of the "*Trustee Act, 1856.*" *Fisher on Mortgages*, 632.

Mr. *Bunny*, for the infant Defendants, did not object to the decree as sought.

*Cur. adv. vult.*

July 14. MR. JUSTICE MOLESWORTH:—  
*Judgment.*

This case is one of a mortgage by deposit of title deeds, to secure a sum due to the bank by a customer. The debtor became insolvent, and the bill is filed by the bank after the death of the debtor; and the question is whether, looking to the nature of the transaction, I should decree a remedy by foreclosure or by sale. The contract between the parties was not exactly for a mortgage; it was an undertaking by the debtor to give security on the lands, but not using the word "mortgage." If it had been for a mortgage, and the mortgage were to be in the ordinary form, there would be in it a power of sale. There is a conflict of authority on the subject as to whether, under

(i) 30 Beav., 218; S. C. 30 L.J., Chy., 651.

such circumstances, the creditor is entitled to a sale or a foreclosure. I have referred to the authorities on the one side collected in *Seton on Decrees* 443 to 448; and on the other in *Spence's Equitable Jurisdiction* and *Fisher on Mortgages*, the latter at pp. 171 and 682, and to *Lechmere v. Clamp* (v); and on a review of the whole of the cases, I consider that the balance of deliberate authority on the subject is in favor of sale and not of foreclosure. Besides, if a decree were made for foreclosure, I should feel bound to give the infant heir a day to shew cause. On this point I have looked at *Price v. Carver* (w) and *Newbury v. Marten* (x). The latter is an express authority that, notwithstanding the "*Trustee Act*," in the case of foreclosure an infant should have a day to shew cause; and in the absence of authority I should be disposed to come to the same conclusion on principle. I have also referred to *Brocklehurst v. Jessop* (y).

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v.  
COZENS.  
Judgment.

"Declare Plaintiffs entitled to the charge claimed by them over the land. Direct an account to be taken of the sum due to them for principal and interest, deducting payments of all dividends in the insolvency, and of all sums received by them, or which but for their wilful default might have been received by them, as mortgagees in possession. Give the infants costs against the Plaintiffs; and give the Plaintiffs their costs, adding thereto those of the infants. If payment be made in six months, direct a release to be given of the Plaintiff's claims; in default, let there be a sale. In case of a sale, Defendants to be declared trustees of the purchasers; adults to convey; and Mr. Seward, of the Master's office, to convey the infant's legal estate."

Decree.  
—

(v) *Ubi supra*.  
(w) 3 M. & Cr., 157.

(x) 15 Jur., 166.  
(y) 7 Sim., 439.

1864.

July 14.

The rule of Court requiring exhibits to be lodged in and retained by the Master's office, is only intended to preserve such exhibits until the hearing; and when that purpose is served, the custody should terminate.

SELWOOD *v.* BURSTALL.

MR. WEBB applied for an order to deliver up to the Plaintiff the documents exhibited by him in this cause.

The Plaintiff's bill had been dismissed. The practice of the office is to re-deliver documents exhibited, only on the consent of both parties. The Defendant's solicitor refused to consent, being in no hurry to get his own client's exhibits.

*Jamieson v. Allen* (z), *Dunn v. Dunn* (a), and *Supreme Court Rules*, cap. vi., rule 15, which in terms directs that the documents be lodged in and retained by the Master's office, were cited.

*Judgment.*

MR. JUSTICE MOLESWORTH.—I think the rule is only intended to preserve exhibits until the hearing; and that when that purpose is served the custody should terminate. In any case, unless wanted for accounts subsequently, I would, if applied to on the decree, order them to be returned. The necessity of a substantive order here is, I think, doubtful. I will, however, grant the application for delivery up of Plaintiff's exhibits.

*Order made.*

(z) Sup. Ct. Vic., 11th Sept., 1862.  
(a) 3 Drew, 17.



FISHER v. JACOMB.

1864.  
July 28.

IN this case (reported on an injunction motion *ante* p. 91) the Defendant demurred to the bill. The Plaintiff did not set down the demurrer for argument within eight days after its having been delivered as required by the *Supreme Court Rules* (b).

Where a Plaintiff did not set down a demurrer for argument within eight days after its delivery; Order made *ex parte* that Plaintiff should pay the costs of the demurrer and suit.

Mr. *Lawes* now moved *ex parte* for an Order that the Plaintiff should pay the costs of the demurrer, together with the further costs of the suit; and cited *Mackenzie v. Claridge* (c) and *Turner v. Sampson* (d).

His Honor made the Order.

(b) Cap. vi., r. 8.

(c) 6 Beav., 123.

(d) 8 Jur., 1134.

PRESS v. HARDY.

July 25, 26,  
August 4.

THIS was a suit instituted by the Plaintiff as devisee under the will of *Henry Howard*, dated the 17th day of December, 1859, against the other devisees and the executors, for execution of the trusts, and particularly to obtain the opinion of the Court as to which of several properties devised under the will should bear the burden

A testator, after appointing executors, devised to his wife a portion of his real estate for her life, and bequeathed to her all the ready money

of which he might die possessed, and directed her to pay his funeral and testamentary expenses, and also "all debts due at decease."

*Held*, that to the extent of the life-estate, and ready-money given to the wife, and to that extent only, such direction was the signification of an intention to exonerate lands subject to equitable mortgages from mortgage debts within the meaning of the Act No. 61; that the estate in remainder after the wife's death was not chargeable with such debts; and that "debts due at decease" would include debts the time for payment of which had not arrived at the time of testator's death.

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 —  
*Statement.*

of a debt charged by an equitable mortgage in the testator's lifetime on the land devised to the Plaintiff alone.

The will, after appointing executors, was in the following words:—"I give devise and bequeath all my farms situate and being at Burrumbeet in the said colony containing by admeasurement about 480 acres to my wife *Isabella Howard* during her life and to receive and take the rents issues and profits thereof to and for her own absolute use and benefit free from the debts control or engagements of any husband she may hereafter intermarry. And after her death I give devise and bequeath the same to my mother *A. M. Howard* and my youngest sister *E. R. E. Howard* at present residing in England to and for their sole and separate use and benefit share and share alike." It then gave the house in which the testator lived at Ashby, and his furniture to his housekeeper, *Mrs. Walden*, and proceeded as follows:—"I give devise and bequeath all my equal undivided moiety or half part or share in all that other property situate at Burrumbeet aforesaid at present under the management of my partner *Mr. George Beaton* and containing about 120 acres to *Mrs. Margaret Press* to her own use and benefit free from the debts control or engagements of any husband she may hereafter intermarry. I bequeath to my said wife all my ready money I may be possessed of at the time of my decease. I direct my said wife to pay my funeral and testamentary expenses, and also all debts due at decease."

*E. R. E. Howard* and *Mary Walden*, two of the devisees, left the suit undefended.

*Argument.*  
 —

*Mr. Bunny* for the Plaintiff.—There is a clear declaration in the will that the testator's widow is to pay his debts; and as the ready money bequeathed her was altogether insufficient for such a purpose, the payment of

debts is thrown upon the real estate devised to her, which she took subject thereto. She is given a life interest in the real estate after satisfying debts thereout; and after her death the real estate devolved to those entitled in remainder, subject to the same charge which was not intended to apply solely to the life estate given her. Cases upon the English Act, of which the Act No. 61 is a verbatim adoption, clearly shew that the declaration contained in the testator's will excluded its operation, and that mortgaged lands were not intended to descend *cum onere*. The testator's intention being to exonerate the land devised to the Plaintiff, at the expense of other real estate, all his real estate, except that devised to the Plaintiff, must contribute towards paying off the debt. *Wolstencroft v. Wolstencroft* (e), *Mellish v. Vallins* (f), *Allen v. Allen* (g), *Eno v. Tatam* (h), *Lomax v. Lomax* (j), *Custance v. Bradshaw* (k), and *Jarman on Wills*, 2nd ed. Vol. II., p. 508.

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Mr. *Billing* and Mr. *Molesworth*, for the executors, did not argue the questions raised by the bill, but asserted their right to costs, citing *Seton on Decrees*, p. 165, *Wilson v. Squire* (l), *Bunnett v. Forster* (m), and *White v. Jackson* (n).

Mr. *J. W. Stephen* and Mr. *Holroyd* for *Anna Maria Howard*, one of the devisees.—If the Plaintiff fail in obtaining the relief asked costs should not be borne by the testator's estate, this being the suit of a devisee advancing an extraordinary view of her rights, which is not justified by any ambiguity in the language of the will. The accounts and general relief to which she might have been entitled in a suit properly framed, cannot be obtained in this, where a declaration is sought which would entitle her to relief

(e) 80 L. J. Chy., 22.  
(f) 81 *Ib.*, 592.  
(g) 81 *Ib.*, 442.  
(h) 82 *Ib.*, 159-811.  
(j) 12 Beav., 285.

(k) 4 Flan., 815.  
(l) 18 Sim., 212.  
(m) 7 Beav., 540.  
(n) 15 Beav., 191.

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—  
*Argument.*

on an entirely different basis. The question of exoneration of mortgaged estates is still one of intention, and the cases upon the Act shew that the intention to exonerate the mortgagee's lands and thus alter the new rule which it introduces must be clearly expressed to exclude its operation. *Boughton v. Boughton* (o), *Pembroke v. Friend* (p). No such clear intention appears in this will. The gift to the Plaintiff does not extend to the stock and chattels on the devised land. The words "containing 120 acres" must be read as defining the interest which the testator wished to give in the Burrumbeet property. The direction to the widow to pay debts due at death cannot apply to the sums secured by bills of exchange falling due after the testator's decease.

Mr. *Bunny* in reply.

*Cur. adv. vult.*

*August 4.*  
—  
*Judgment.*

MR. JUSTICE MOLESWORTH :—

This case depends upon the construction of the will of *Henry Howard*, dated 17th December, 1861, and the effect of the Act No. 61, to which it is subject. It is necessary for its proper construction shortly to advert to the position of the testator as to the properties he held at his death. Before 3rd April, 1857, he entered into negotiation with persons named *Beaton* for the purchase of a moiety of a farm at Burrumbeet, called the Nelson Springs Farm, Portion 104, containing about 120 acres, and the crops, stock-in-trade, farming implements, &c., on it, for the price of £1,500, secured by four bills drawn by *George Beaton*, respectively payable in one, two, three, and four years; and also for a partnership for five years with *George Beaton*, to be carried on upon

(o) 1 H. L. Cas., 435.

(p) 1 J. & Hem., 152.

the same farm ; and by articles of partnership dated 8rd April, 1857, it was stipulated accordingly, and that the said farm should be part of the partnership stock. According to part of the same arrangement the legal estate in the entire of the Nelson Springs Farm was conveyed to *Howard*, and he deposited the title deeds of it and of another farm which he held in fee at Burrumbeet, called the Little Forest Farm, Portion 140, with *James Beaton*, by memorandum 6th April, 1857, of equitable mortgage, for securing the payment of the four bills. *George Beaton* and *Howard* farmed in partnership accordingly until *Howard's* death. *Howard* in 1859 conveyed an undivided moiety of the Nelson Springs Farm to *George Beaton*, so that they became tenants in common of the legal estate in it ; part of the purchase-money bills was paid off in *Howard's* lifetime, part remains unpaid. In 1859 *Howard* made a further equitable mortgage of the Little Forest Farm for securing £150. *Howard* also had an estate in fee, in Portions 108 and 116, near Burrumbeet, making (with Portion 140) 480 acres. He also had an estate in fee in land and house where he resided, at Ashby, near Geelong, subject to a lien for a balance of unpaid purchase-money. [His Honor read the will as set out above.]

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 —  
*Judgment.*

The Plaintiff is *Margaret Press* ; the Defendants, *Hardy* and *Mackie*, the executors ; *Anna Maria Howard*, the mother ; *E. R. E. Howard*, the sister ; and *Mary Walden*. The widow, *Isabella*, died very soon after *Howard*, and is admitted by all parties to have received no property of his unapplied worth inquiry.

As to the various points upon the construction and effect of the will which have been discussed before me, I hold that the gift to the Plaintiff *Margaret Press* was confined to the legal estate in the moiety of the Nelson Springs Farm, and did not extend to stock, &c. I infer this from the words "containing about 120 acres"

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 —  
*Judgment.*

and the parallelism between the trusts of it and those of mere freehold devised to other women. I hold, however, that this continued to be partnership property and personal estate in equity. I think that the widow's life estate in Portions 103, 116, and 140, and the ready-money, notwithstanding the separation of the gifts, were liable in the first instance to the payment of all *Howard's* debts, including both the equitable mortgages, and the balance of unpaid purchase money; the words directing payment of all debts being, according to *Pembroke v. Friend*, *Mellish v. Vallins*, and *Eno v. Tatam*, sufficient to shew she should exonerate the devised estate. "All debts due at "decease," would, I think, include *debita in presenti solvenda in futuro*. I do not think the disproportion between debts and ready money at the date of a will can legitimately control such a construction as both are variable in amount during the testator's life. But I do not think this charge upon the widow would extend further, and subject even undisposed personalty to exonerate the devised estates from mortgage. The small amount of property received by the widow, and of the undisposed personal estate, render my opinion on these points unimportant, and make me decide them less carefully than I should otherwise do. I feel doubt whether the testator's share of property held in partnership was so mixed with the interest in the land farmed that it should exonerate the Plaintiff from payment of the equitable mortgage. The matter has not been discussed, and may not prove important.

The subject of earnest argument before me has been a claim by the Plaintiff to have the share in the Nelson Springs Farm exonerated from the equitable mortgage by the estates devised to the mother and sister in 103, 116, and 140, the line of argument being that because the life estate of the wife was so charged the remainder must be. I have not been referred to any authority which, to me, appears to sustain such an

argument. In the case of *Cloudsley v. Pelham* (g), which appears to have been affirmed on appeal (r), the testator devised lands to *Pelham*, and the heirs of his body, with remainder over; and, in another part, reciting that he owed *Pelham* money on account, he, therefore, devised to him all his personal estate and made him executor, willing him to pay his debts; it was held that the real estate was made liable to the payment of debts. But there an estate was devised to *Pelham* which, if unencumbered, he could have disposed of absolutely, and an intention was shewn to have all debts, and that to *Pelham* in particular, paid, which he might not have been able to pay by personal estate or rents and profits received during his life. In a case before Lord Rosslyn, *Finch v. Hattersby* (s), by a will, the particulars of which from the registrar's book appear in Mr. Russell's Reports, the testator directed all his debts, to the value of 20s. in the pound, and his funeral expenses, should be paid by his executrix thereafter named, and he gave to his wife all and singular his houses, lands, messuages, and tenements whatsoever, with their appurtenances, situated at, &c., and he gave to his wife all the rest of his goods and chattels, and personal estate whatsoever, which said houses, messuages, lands and tenements, goods, chattels, and personal estate, he willed should be fully possessed and enjoyed by his wife for and during her life, and at the end thereof divided by his wife among their children, in such proportions, &c.; and he thereby constituted her, his said wife, executrix of his said will. This will was construed to charge the real estate with payment of debts. But in it the real and personal were thrown into a common limitation. The earlier words gave the wife the real estate for an indefinite period, the latter restricting them generally to a life estate, and there was no reason to suppose her income should be less than that given to the children. This case was referred to in *Powell*

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(g) 1 Vern, 411; and 1 Eq. Cas. Ab., 197.

(r) 2 Vern, 228.

(s) 3 Russ., 345. (n)

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*Judgment.*

*v. Robins (t)*, on memory, by a barrister who had a note of it, in which the restriction of the estate to a life estate had been altogether overlooked. It is with similar oversight quoted in *Harris v. Watkins (v)*. In both *Cloudsley v. Pelham* and *Finch v. Hattersby*, the devisee of the particular estate was also executor; and it is more probable a testator intends an executor to have a power of applying the corpus of real estate in payment of debts than a mere devisee of life estate. In *Harris v. Watkins* the testator directed that all his debts should be paid by his wife, executrix; gave several devises—one to his wife for life with remainders over, and gave his wife the residue of his real and personal estate: and it was held that the residuary estate should exonerate that devised to the wife for life. In *Cook v. Dawson (w)*, a testator directed that his debts should be paid by his executrix thereafter named, then devised to his wife all his real estate, to receive the rents during her life, and if his wife should find the rents of the real estate to be inadequate for her proper maintenance he gave her full power to mortgage the real estate so far as should be needful for her maintenance; and at the decease of his wife he devised the real estate to his brother, nephews and nieces, and appointed his wife sole executrix. In that case it was held by *V. C. Kindersley* that the life estate of the wife was clearly charged with payment of debts, but that the estates in remainder were not. If in the case before me I were bound to couple the particular estate and remainders as to liability to exonerate the Plaintiff, I certainly should say that both were exempt from, rather than both subject to, that liability.

The equitable mortgage to *James Beaton* comprised both the Nelson Springs Farm and the Little Forest Farm, and should be discharged, I think, so far as not otherwise paid by the Plaintiff and Defendants Mrs. and Miss

(t) 7 Ves., 210.

(v) Kay, 442-446.

(w) 7 Jur., N.S., 180.



*Howard*, in proportion to the value of the lands devised to them respectively. But the fact of the equitable mortgage including both is not noticed in the bill or answer of the Defendants, the *Howards*;—it is in the answer of the executors.

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—  
*Judgment.*

The bill states the will, debts remaining unpaid, the partnership with *George Beaton*, but insists that half the partnership property was bequeathed to the Plaintiff; further states a claim by *George Beaton* to retain the partnership property in satisfaction of a debt due to him, but insists that the personal estate should be applied in payment of that debt (if any), and all other debts, and if the personal estate be insufficient, insists that such debts are by the will charged upon the property devised to the widow for life, with remainder to the Defendants *Howard*. The bill prays an account of debts, funeral and testamentary expenses, personal estate not specifically bequeathed, and for an application thereof in payment of debts, &c., so far as it will extend; a declaration that the property devised to the widow for life, &c., with remainder over, is charged with payment of the debts; a sale to raise the amount; and, if that estate be insufficient, then that the deficiency be raised from the properties devised to Plaintiff and Defendant *Walden* rateably, and that Plaintiff may have the moiety of all the partnership property exonerated as before. The bill prays generally that for the above purpose all proper directions may be given and inquiries made, and for general relief.

From what I have said above it is plain that I do not at all concur in the views of the Plaintiff's right urged by the bill, and I have been called upon by the counsel of the Defendants *Howard* to dismiss it absolutely. But the Plaintiff is, I think, entitled to the accounts prayed, and an ascertainment of the liability of the estate devised to her in particular, and of the outstanding debts of the testator; and I

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 —  
*Judgment.*

think that the present Defendants would be all proper parties to accounts of debts, &c.; the *Howards*, as their estate might in the event of the deficiency of others be liable. Retaining them for such purposes, I think I should not withhold from the Plaintiff a relief to which she is entitled, namely, an apportionment of liability between the moiety of the Nelson Springs Farm and the Little Forest Farm. In *Palmer v. Graves* (x), a creditor's bill alleged that the testator was a trader, and his real estate therefore liable to debts; but if he was not a trader, prayed that his assets might be marshalled, an account of his personal estate, and his will be declared well proved, and if his personal estate was insufficient to pay his debts, then that the freehold might be declared liable. The result shewed that the testator was not a trader, but the Court refused to dismiss the bill, and entertained the question of the debts being charged by the will on the real estate, and gave relief accordingly. According to my present views, I should take care upon further directions to indemnify the Defendants and their estate from costs incurred up to the present time. The executors appear to have received some rents of the estates devised to the Defendants *Howard* which accrued due after the devise was in operation; these should be handed over to the devisees.

Some difficulty may occur in these inquiries as to partnership property from *George Beaton* and the representatives of *James Beaton* not being parties, but they will probably come in as creditors, and then the partnership property may be proved as matter of set-off. The legal estate in the moiety of the Nelson Springs Farm, vested in the Plaintiff, can, if necessary, be used by her to force the *Beatons* to an adjustment, or to come into Equity. From the correspondence between the executors and *George*

(x) *Kay*, 545.

*Beaton*, I should think there is no probability of any unreasonable obstruction to an adjustment by him.

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*Judgment.*

"Refer it to the Master to take an account of the debts, funeral and testamentary expenses of the testator, *Henry Howard*, publishing advertisements, distinguishing the estates and properties upon which the debts were respectively chargeable, and distinguishing the debts already paid, and by whom paid, and the debts remaining unpaid. Refer it to the Master also to take an account of the personal estate of the said *Henry Howard*, into whose hands the same came, and how the same has been disposed of. Refer it also to the Master to inquire and report the particulars of the property held by the said *Henry Howard* in partnership with *George Beaton*, in whose hands the same now is, and the debts to which the same is liable. Refer it also to the Master to inquire and report the values of the undivided moiety of portion No. 104 and portion No. 140, at Burrumbest respectively, at the time of the death of the said *Henry Howard*, without including crops then growing. Reserve further directions and costs."

EX PARTE BERTRAM NATHAN.

IN THE MATTER OF THE TRUST ESTATE OF SAMUEL BARNETT, AND

IN THE MATTER OF THE ACT 7 VICTORIÆ, No. 19.

**R**ULE nisi obtained by *Bertram Nathan*, calling on *Joseph Aarons*, as trustee under a conveyance and assignment made by *Samuel Barnett*, in pursuance of 5 Vic., No. 9, to shew cause why he should not pay *Nathan*, a creditor who executed the deed, £25 5s., being a dividend of 2s. 6d. in the pound on £170, for which *Nathan* executed the deed; and, if necessary, why *Aarons* should not deliver to *Nathan*, or file in the office of the Master in Equity, a full,

August 18.

certify to be due; and that the trustee should act under the direction of a meeting of creditors. On rule nisi by a creditor for payment of a dividend on a debt claimed by him, but which the trustee refused to certify, and under direction of a meeting of creditors, declined to pay a dividend upon;

By an assignment in trust for creditors it was provided that no creditor should be entitled to receive a dividend upon any greater sum than the trustee should

*Held*, that it was the duty of the trustee to exercise such a discretion as the deed reposed in him, and rule discharged; but, it appearing that its provisions came upon the applicant as a surprise, without costs.

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true, and particular account of all moneys and property which have come to his hands as such trustee, and of his appropriation thereof; and also attend before the Master and submit to be examined on oath, and produce all papers, &c., in the matter; and why he should not pay the costs of this rule.

*Samuel Barnett* executed a deed, dated 6th May, 1864, which purported to be an assignment under 5 Vic., No. 9, to *Joseph Aarons*, in trust for the benefit of all the creditors of *Barnett*. The deed purported to be executed in conformity with the Act, and contained the provisions usual in such deeds. It also contained the following clause:—  
 “That no creditor who shall execute these presents, nor  
 “any creditor of the said assignor shall be entitled to any  
 “dividend under the trusts aforesaid who shall not forth-  
 “with, upon request in writing of the said trustee, his  
 “executors, &c., deliver to him or them a written state-  
 “ment, with full particulars of the account and demand  
 “of such creditor; and, if required by him or them,  
 “make a solemn declaration before a magistrate of the  
 “truth and justice of the debt claimed; nor shall any  
 “creditor who shall execute these presents be entitled to  
 “receive a dividend upon any greater or other sum (in  
 “case his debt shall be disputed in whole or in part) than  
 “the said trustee, his executors, &c., shall, by writing  
 “under his or their hand, certify to be due and owing to  
 “the said creditor or creditors respectively, notwithstand-  
 “ing a larger or any other sum may have been placed  
 “against the name or signature of such creditor or credi-  
 “tors in the schedules hereto, or either of them.” Other  
 clauses placed the trustee under the direction of a meeting  
 of the creditors duly convened, and described how proof  
 should be made of the proceedings at such meetings.

*Aarons* had advertised a dividend of 2s. 6d. in the pound. *Barnett* applied for a dividend on his debt, which was

claimed in respect of alleged advances upon certain bills of exchange. *Aarons* doubted the genuineness of the debt—both from the answers of the debtor and the creditor, and from the books of the debtor. He refused to certify any amount as due, and took the opinion of a meeting of the creditors. The meeting directed *Aarons* “to refuse payment of dividend on *Mr. B. Nathan's* claim until sufficient evidence has been produced that the claim is a just one, and that the money was really advanced on said bills.” *Aarons*, acting on this direction, and also because, as he swore in his affidavit, “he always doubted and still doubts the truth” of the information given him by *Barnett* as to the consideration given for the bills, refused payment of the claim.

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*Mr. Lawes*, for *Aarons*, shewed cause against the rule.

Argument.

*Mr. Billing* in support of the rule.

MR. JUSTICE MOLESWORTH :—

Judgment.

This application comes before me as under a deed purporting to have been made under the 5 Vic., No. 9. It has express reference to that Act, but it has clauses which are inconsistent with its provisions. Power is reserved to the trustee to use his discretion in admitting claims and certifying them to be properly due and owing to creditors. Another clause directs that meetings of the creditors may be held, and the trustee is placed under the governance of such meetings as to whether claims made shall be admitted or not.

Here, whether rightly or wrongly, the trustee has declared that he is not satisfied with the truth of the account given, and has refused to certify that the debt claimed is due and owing to the applicant; and the meeting also directed that *Nathan's* claim should be resisted.

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It is unnecessary to decide whether these clauses do throw the deed out of the Act—as to whether, for instance, such a deed would afford protection against an act of insolvency. But the question on this application is, whether the rights sought to be enforced are enforceable in the way sought; and under the circumstances of this case, I should have thought that the applicant was somewhat unreasonably treated, so far as concerns the manner in which his application was dealt with. But as to his rights, it was certainly the duty of the trustee to exercise such a discretion as the deed reposed in him. That deed, however, I should think, was executed by the applicant without a full knowledge of the precise nature of its provisions; and I am of opinion that such a deed as this ought not to have been hawked about among the creditors for execution by them as a deed under the Act referred to in it. I believe that its provisions now come upon the applicant as a surprise. I therefore refuse his application without costs.

*Rule discharged without costs.*

*September 6.*

M'LACHLAN v. M'CALLUM.

The Court will not entertain an administration suit until there is a full personal representative before the Court, and the obtaining an order for letters of administration without the letters being taken out, does not constitute such a representative.

**C**REDITOR'S Suit instituted by *John M'Lachlan*, on behalf of himself and all other creditors of *Alexander M'Callum*, draper, of Dunedin, deceased.

The bill alleged that *M'Callum*, at the time of his death, was indebted to the Plaintiff in the sum of £720 2s. 2d., for goods sold and delivered and money lent; that *M'Callum* died intestate, and that his widow (the Defendant) *Margaret M'Callum*, subsequently possessed herself of the estate of the deceased, under letters of administration granted to her by the Supreme Court of Victoria; that the deceased

left property to a considerable amount—more than sufficient to pay the claims of the Plaintiff and the other creditors; and that the Defendant had refused to pay the Plaintiff's demand.

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The answer of the Defendant stated, *inter alia*, that she had not yet been constituted the legal representative of the intestate, because she had not taken out letters of administration, although she had possessed herself of the estate. From the evidence it appeared that the Defendant had obtained an Order of this Court for the grant of letters of administration to her, but that such letters had not been taken out.

The suit now came on for hearing.

Mr. Moore for the Plaintiff.

Argument.

Mr. Bunny, for the Defendant.—The bill must be dismissed, with costs. There is nothing to shew that the intestate was possessed of any estate within the jurisdiction. The letters of administration, though applied for, were not taken out, and, therefore, there is no person before the Court over whom the Court has any jurisdiction. *Simons v. Milman* (y), *Jones v. Howells* (z), *Cleland v. Cleland* (a), *Creaser v. Robinson* (b), *Logan v. Fairlie* (c), *Harrison v. Harrison* (d), *Williams on Executors*, 5th ed., p. 248.

Mr. Moore, in reply.—In a notice issued in February last by the Defendant to the creditors of the intestate, requesting them to send in their claims, as she desired to wind up the estate as soon as possible, she intimated that letters of administration were granted to her in November,

(y) 2 Sim., 241.

(z) 2 Hare, 342.

(a) Dan. Chy. Prac., 220.

(b) 14 Beav., 589.

(c) 2 S. & S., 284.

(d) 4 No. Cas., 455.

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1863. Under these circumstances, the creditors have no opportunity of obtaining letters of administration.

MR. JUSTICE MOLESWORTH :—

The grant of administration in this Court is conditional; and unless the person obtaining it enters into the necessary security and complies with the rules, the Order is of no avail. The general principle is that this Court will not entertain an administration suit until there is a full personal representative before the Court; and the obtaining an order for letters of administration, and not acting upon it, does not constitute a full personal representative.

Notwithstanding this objection was taken by the answer, and the difficulty was apparent from the beginning, the Plaintiff has not thought fit to seek to amend, but has improperly forced on the case to a hearing. However, I will permit the case to stand over, the Plaintiff paying the costs of the day in order to give the Plaintiff the option of submitting to the bill being dismissed without costs, or of taking out administration, and amending his bill stating that fact and alleging that the Defendant received assets and made disbursements, and seeking an account of how she stands in reference to the estate of the deceased. The Plaintiff may be allowed until Thursday to make his choice.



LAVEZZOLO v. THE MAYOR, COUNCILLORS AND  
BURGESSES OF DAYLESFORD.

August 30.  
Sept. 5, 15.

**M**OTION by the Defendants to dissolve an injunction obtained by the Plaintiff to restrain the Defendants from prosecuting municipal works in the formation of the levels of certain streets in Daylesford, by which, it was alleged, access to the Plaintiff's property would be rendered less convenient, and his property depreciated in value.

Where a street is not already levelled and paved, it is not obligatory upon a Municipal Council to fix its level under the Act No. 184, sec. 281, before altering its existing level.

The bill stated that the Plaintiff was the owner of a public-house situate at the junction of Camp-street and Albert-street, Daylesford, the principal story of which opened upon Camp-street, but the basement story of which public-house, owing to the difference between the levels of the two thoroughfares, opened directly upon Albert-street; that in May, 1864, the Defendants declared their intention to raise the level of Albert-street to such a height, and so close to the wall of Plaintiff's public-house, as to almost wholly block up the doors and windows; that they actually began the work, but stopped on the Plaintiff objecting that they had not given proper notice; that nevertheless they designed to carry out their intentions, and on the 12th July commenced to alter the level of Camp-street by raising it to such a height as would necessitate the raising of the level of Albert-street; and the bill averred that the Defendants had never taken the necessary steps under the Act No. 184, sec. 281, *et seq.*, to fix the levels of the street in question.

The rule that all material facts must be brought forward on obtaining *ex parte* injunctions is a useful one; but care must be taken not to carry it too far, by which prolixity would be produced.

The answer stated that on the 21st March, 1862, the levels were fixed by resolution of the then Daylesford Municipal Council; that in the August following a foot-path on the side of Camp-street, opposite Plaintiff's house, was formed and gravelled according to those levels; and

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that in April, 1863, when the Plaintiff contemplated building his house, the levels, according to which the Defendants now intended to construct the streets, were furnished to him by the town surveyor; and that the Plaintiff built with notice of such intended levels.

The bill and answer were respectively verified by affidavit.

The affidavits, in reply, filed by the Plaintiff for the purpose of opposing this motion, stated that the footpath referred to in the answer was made by a private person for a temporary purpose; and that in December, 1862, the council decided that the permanent level of Camp-street should be three feet, and not six feet, as at present proposed, above the natural level.

*Argument.*

Mr. J. W. Stephen, for the Defendants, in support of the motion.

Mr. Atkins, for the Plaintiff, *contra*.

*Cur. adv. vult.*

September 15. MR. JUSTICE MOLESWORTH:—

*Judgment.*

The injunction in this case is to restrain the municipal authorities of Daylesford from altering the level of Camp-street, so as to incommode the Plaintiff's house, until the level of that street be fixed under the Act No. 184, sec. 281, &c.

In *Palmer v. Service* (e), under the "Road Act," 16 Vic., No. 40, the Court expressed an opinion that the Central

(e) Sup. Ct. Vic., 1860.

Road Board, under words authorising them to improve and manage roads, might change the levels. The first "*Municipal Institutions Act*," 18 Vic., No. 15, sec. 27, gave the municipalities power to manage roads. A similar Act as to municipalities, after 1st October, 1863, No. 184, came into operation from that date, and in that Act there is no limitation as to power. Clause 249 includes among permanent works "the raising, lowering, and alteration of "the ground or soil of streets of which the level shall not "have been previously fixed, as herein provided;" and the subsequent sections give persons who may be injured by such permanent works a power of being heard before the council, and an appeal to the Board of Land and Works. Clause 260 gives the management of streets to the council. Clause 263 authorises the council from time to time to cause all streets to be paved, &c., and the ground or soil to be raised, lowered, or altered, as they think fit; and to make footways, and to repair such streets or footways; followed by a provision, "that the ground or soil of "any street whereof the level has previously been fixed, as "hereinafter provided, shall not be raised or altered save "so as to conform to such level." Clause 277 directs persons laying out new streets to give notice to the council, in order that the level may be fixed by it. Clause 278 authorises the municipal surveyor to fix the level, subject to appeal. Clause 279 provides that, in default of the council acting, the owner may lay out at any level he thinks fit, and the council are made liable for damages caused by subsequent alteration. Clause 280 imposes a similar liability on the owner laying out without notice given, as provided in clause 277. Clause 281 directs that "two months at least before fixing the level of any street "which has not become a public highway, or any street "which has not theretofore been levelled or paved, the "council shall give notice by advertisement of their intention to fix the level thereof, which notice shall refer to "plans of such intended work, and shall specify a place

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“ where such plans may be seen, and a time when and  
 “ place where all persons interested in such intended  
 “ work may be heard thereupon.” Clause 282 provides  
 for hearing objections by the council ; and clause 288, for  
 appeal to the quarter sessions.

The bill and verifying affidavits in this case state, that  
 in 1862, the Plaintiff built a public-house, two stories  
 high, at the intersection of Camp and Albert streets, then  
 public highways, which have never yet been levelled or  
 paved ; that the council intended to raise the ground of  
 Albert-street, so as to obstruct the use of Plaintiff's lower  
 story, and had begun to raise the level of Camp-street, so  
 as to make their intended elevation of Albert-street neces-  
 sary ; and that the council had never taken the steps pre-  
 scribed by the Act to fix the level of either street.

The main question with which I have to deal is, whether  
 it is obligatory upon the council to fix the level of Camp-  
 street under sec. 281, before, in fact, altering its level ; and  
 upon careful consideration of the Acts, I think it is not.  
 The previous “ *Municipal Act* ” gave unlimited powers of  
 varying the levels of streets, and so expressly sec. 263 of  
 the present Act, gives the same power from time to time  
 to be exercised. Clause 281 directs something to be done  
 before fixing the level, but that is not an implied direction  
 to fix the level. Great hardship may be inflicted on indi-  
 viduals by variations of the levels of these streets ; but  
 clauses 249, &c., afford a protection not adverted to in  
 argument. The fixing a level might produce great public  
 inconvenience—for when once the level of a street is fixed,  
 I apprehend that, however important and desirable it might  
 be to make an alteration in that level, if a single dissen-  
 tient in that street objected to that alteration, it could  
 only be done by a private Act of Parliament. I therefore  
 think it very material that the council should be left a  
 discretion as to whether they will ever do that irreparable

act or not. In order to dissolve the present injunction it is not necessary for me to say whether, if a street be in fact levelled and paved, the level can afterwards be altered.

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The Defendants' answer and affidavits on both sides brought forward several facts not disclosed by the Plaintiff originally. The former municipal council, in 1862, came to a resolution as to the level of Camp-street, including the part in dispute; and the Plaintiff, before building his house, advised with the officers of the council as to that level, and alleges that he built according to it, and that the contemplated works are a deviation from it—higher than it. The Defendants, on the other hand, insist that the contemplated works are conformable to the resolved level. A footway was made by some individuals at the opposite side of the way, conformable to that resolved level, according to the Defendants' view, and, as they say, under their direction.

The principal discussion in this case has related to this question, which has sprung out of the original question raised, and has been, not so much as to the obligation of the council to fix the levels, but as to whether or not the Plaintiff's house has been built in conformity with the levels fixed by the prior council.

It has been insisted before me that the Plaintiff brought forward his case with such a suppression of material facts upon obtaining this *ex parte* injunction, that it should be discharged on that ground. I have referred upon this point to *Hilton v. Lord Granville* (f), *Hemphill v. M'Kenna* (g), and *Dalglish v. Jarvis* (h). The bill states that the Defendants allege, but the Plaintiff denies, that the level of Camp-street has been already fixed by the former council; that Plaintiff submits that

(f) 4 Beav., 130.

(g) 2 Con. & L., 76.

(h) 2 Mac. & G., 231.

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the former council had no power to fix the level of any street, and even if it had, the present council is not bound by any such fixing; but the present council is bound, if it intends to alter the level, first to fix the future level. The fact of the former resolution is sufficiently adverted to, and I concur in the view that it did not bind anybody as to the permanent level. The actual level of the Plaintiff's house in regard to the proposed change would, in my view, bind nobody, but might have influence as to granting an injunction; but the facts remain altogether in dispute. I do not think the footway such an approach to levelling, in fact, as to raise the effect of such actual levelling, or possibly to influence the granting an injunction. This rule, that all material facts must be brought forward on obtaining *ex parte* injunctions, is a useful one; but care must be taken not to carry it too far, by which an enormous amount of prolixity would be produced. If parties are to state every fact which may by ingenuity afterwards be held to be material, there is no knowing to what a degree of prolixity such a course would lead. I think, on the whole, I should not discharge the injunction as on the ground of material facts having been suppressed in obtaining it; and I shall, therefore, follow the ordinary mode of letting the costs of this motion be costs in the cause.

*Injunction dissolved. Costs to be costs  
in the cause.*

EVANS v. GUTHRIDGE.

Aug. 10, 22.  
Sept. 6, 7, 15.

**T**HIS Suit, which is reported upon the original hearing (2 Wy. & W., Eq. 83), now came before the Court upon exceptions to the Master's Report.

By the decree of the 3rd August, 1863, it was referred to the Master "by taking an account of such net profits to ascertain a sum equal to the tenth part of the net profits of the contract entered into with the Board of Land and Works, by articles dated July 22, 1858, from the com-

*E., M., & L.*, partners as contractors for making a particular railway, provided by their deed of partnership, dated December 24, 1858, that *L.* should receive from the partnership £100 per month for the

use of the railway-plant, &c., belonging to him, and brought upon, and then employed in making the railway, and after the completion of the railway such plant, &c., should revert to and continue the sole and absolute property of *L.* In this partnership *L.* was, in fact, a trustee for *N. & R. G. & Co.* After this deed, fresh plant was bought and intermixed with the old, and both the old and fresh plant repaired. By a deed of 21st March, 1860, the partnership between *E., M., & L.* was dissolved, and a fresh partnership entered into between *L.* and *W.*, and it was *inter alia* provided that the plant, &c., then upon the railway, should be valued, the plant be assigned to *W.*, and the amount of valuation, be paid to the trustees of *N. & R. G. & Co.'s* estate; and by the same deed *E.* and *M.* assigned to *W.* their shares in the contract; and *L.*, with consent of *N. & R. G. & Co.*, and the trustees of their estate, assigned to *W.* the plant, &c., then being upon the railway. In taking an account of the net profits of the contract, the Master excluded from the disbursements on account of the contract, the sum of £76,857 12s. 1d., paid for the purchase and repair of plant up to the 21st March, 1860, and charged the contract only with a rental for plant of £100 per month, amounting to £1,500. On exceptions to his report,

*Held*, that in ascertaining the profits of the contract, neither the Master nor the Court should depart from the rights defined by deed, or receive any parol evidence to vary them. That under the deed of December, 1858, *L.* was under no obligation to supply additional plant, but that the deed of March, 1860, treating the plant, &c., at that date as the property of *L.*, and not of *E., M., & L.*, was conclusive upon the parties; that all expenses of repairing plant, prior to 24th December, 1858, and incurred with his approbation subsequently to that date, should be borne by *L.*; and exceptions overruled.

*E., M., & L.*, partners in a contract, dissolved partnership, and *E.* and *M.* retired from the contract. By the deed dissolving the partnership, it was provided that *E.* and *M.* should each by *L.'s* bond be secured a sum equal to one-tenth of the profits of the contract throughout, and be indemnified against losses. *L.* was, in fact, only a trustee for others. Subsequently *L.* was removed as trustee, and *W.* appointed in his place, *L.'s* bonds being given up by *E.* and *M.* on their obtaining a covenant from *W.* to pay and do that which *L.* was bound by his bonds to pay and do. The contract being completed, *E.* and *M.* filed a bill against *W.* and his *cestui que trustent* for an account and payment of a sum equal to one-tenth of the profits.

*Held*, that *E.* and *M.* were only entitled to a personal decree against *W.*, and not against the parties ultimately liable to indemnify him.

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"mencement to the completion of the said contract, and  
 "payable to the Plaintiffs respectively under the deed of  
 "March 21, 1860, to which the Defendant *James Webb* is  
 "now liable."

The Master, by his Report, found that the net profits of the contract from its commencement to its completion were £97,534 0s. 1d., and that the sum of £9,753 8s., being equal to one-tenth of such profits, was the amount payable to each of the Plaintiffs under the deed of March, 1860.

To this Report, the Defendants *Hawthorn, Whitney and Copeland*, excepted, on the ground that the Master had wrongly excluded from the disbursements on account of the contract £76,887 19s. 1d., paid for the purchase, construction and repair of plant used in the execution of the contract prior to the 21st March, 1860, and in lieu thereof included amongst such disbursements the sum of £1,500 for the hire of plant from the 24th December, 1858, to the 21st March, 1860; and that the net profits should consequently have been found at £22,146 1s., instead of £97,534 0s. 1d.

The facts of the case sufficiently appear from his Honor's judgment.

*Argument.*  
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Mr. *J. W. Stephen* and Mr. *Webb* in support of the exceptions.

Mr. *Holroyd*, for the Plaintiffs, in support of the Master's Report.

Mr. *Atkins* for the Defendant *James Webb*.

*Cur. adv. vult.*



MR. JUSTICE MOLESWORTH:—

This case comes before me on exceptions to the Master's Report, under a decree directing him "by taking an account of such net profits to ascertain a sum equal to the tenth part of the net profits of the contract entered into by articles of agreement dated July 22, 1858, from the commencement of the said contract to the completion, payable to the Plaintiffs under the deed of the 21st day of March, 1860, in the pleadings mentioned, to which the Defendant *James Webb* is now liable."

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The question raised by the exceptions generally is, whether the cost of the purchase, making, and repairing of the plant used in the contract, which was for making a railway embankment, cuttings, &c., prior to March 21, 1860, should be charged against the profits, and the different exceptions are pointed to different portions of this entire cost.

The bill, paragraph 17, had charged that plant the property of *N. and R. Guthridge & Co.*, had been used by the firm of *Evans, Merry & Co.*, for a rent of £100 per month, according to an agreement, December 24, 1858, but that the cost price of the said plant had been improperly debited in the books of *Evans, Merry & Co.* against them, thus specially calling the attention of the Defendants to the contents of the deeds as to plant, and the rent payable for it; but no point was made in the answers as to the deeds referred to not truly representing the actual bargain; no such question was debated at the hearing; and the decree expressly refers to a deed of March 21, 1860, which recites all the others, as determining the rights of the parties; so that I do not think the master or I, in proceeding upon the decree, should at all depart from the rights defined by deed, or receive any parol evidence to vary them.

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The work on the contract commenced July, 1858, under articles of agreement between Messrs. *Evans, Merry* and *Little*, by which the shares were fixed—*Evans* and *Merry* each one-tenth, *Little*, eight-tenths. *Little* was to deposit £30,000 with Government as security, and be allowed it, with interest, as a charge on the partnership funds: and should supply further capital to be similarly charged; was to have all the financial management of the partnership, sign all drafts, &c., receive all moneys, &c.; *Evans* and *Merry* to have the management of the working business, receiving salaries from partnership funds for doing so. *Little* really represented certain capitalists. In the working of the contract, plant, consisting of tools, carts, carriages, horses, &c., were from time to time supplied by *Guthridge & Co.*, whom, principally, *Little* represented, and brought into use, repaired, replaced, &c. The horses, from a rough calculation I have made, were about in value one-tenth of the entire. Some expenses for repairs were incurred prior to December, 24, 1858. At that date a deed was executed between the same three partners, *Evans, Merry* and *Little*. It provided that *Little*, beside the deposit of £30,000, should bring in capital not exceeding £50,000 necessary for the contract. In article 7 it was provided that *Little* should receive from the entire net profits of the partnership, as a debt due from it, the sum of £100 per calendar month for the use of the railway plant, chattels, and effects belonging to him and brought upon, and then employed in making the said line of railway and works, and for the use of all and singular the chattels and effects belonging to him then in and about the office, such sum of £100 a month to be paid before any division of profits took place; and after the completion of the said railway and works, or the termination of the said contract, the said railway plant, chattels and effects should revert to and continue the sole and absolute property of the said *Little*; but in the meantime the said partnership should be entitled to the use of the said railway plant, chattels and

effects, and the partnership—subject to the right of the Board of Land and Works, a lien over the said plant, &c. —be the hirers thereof only from the said *Little*, at the monthly sum or recompense aforesaid. This deed then contained a stipulation that the rent, taxes, and repairs of offices, salaries and wages, &c., debts and interest upon debts, should be paid out of net profits. It further contained provisions giving *Little* entire control of the financial concerns of the partnership.

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Now, according to this deed, I think it clear that the plant then in use was to be regarded as merely hired by the partnership. Its prime cost and all expenses and repairs down to that time should be defrayed by *Little*, or those whom he represented, and the partnership be chargeable with the rent only; but a question of considerable difficulty arises, whether the expense of subsequent repairs of that plant should be borne by *Little* or the partnership. The forethought of persons making uncommon bargains generally provides for the relative liability of owner and hirer. On this subject usage supplies the place of forethought as to common bargains for land, houses, lodgings, carriages, horses, &c., and there is a great want of authority on the abstract question between owner and hirer, and no definite bargain, who pays for repairs. *Story on Bailment*, sec. 383, states that, by the civil and foreign law, the liability is thrown on the owner. This is qualified by reference to local usage, sec. 388; and as to the law of England, sec. 392, he speaks very doubtingly. There is one part of this plant—horses—as to which, if it stood alone, the hirer would clearly be liable by usage to find food, stabling, shoes, &c. One cannot from the law as to so small a portion of the plant decide the point as to the entire.

On the whole, looking at the only matters legitimately before me, namely, what had been done before as to the

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 —  
*Judgment.*

plant, and the words of the deed of December 24, 1858, I incline to think that all expenses of repairing plant prior to that date, and incurred with his approbation subsequent to that date, should be borne by *Little*. No evidence of usage on the subject has been tendered. I should say clearly, if the rights of the parties depended on the deed of December, 1858, *Little* was under no obligation to supply additional plant, otherwise than as financier, at the expense of the partnership. Although by the partnership deeds *Little* was appointed financier, his actual business seems to have been paying the labourers, and his other duties were executed by Mr. *Richard Guthridge*, who appointed a bookkeeper for *Evans, Merry & Co.*, and directed the manner of keeping their books, and instructed the bookkeeper as to preparing accounts between them and his firm, *N. and R. Guthridge & Co.* This firm were the principal capitalists represented by *Little* as a partner, and purchased up the interests of others successively. They were also the owners of the plant originally used by *Evans, Merry & Co.*, and, as merchants, supplied the necessary additions. Mr. *R. Guthridge* further held a power to accept bills on behalf of *Evans, Merry & Co.*

The contract was carried on after December 24, 1858, the old plant being used and repaired; fresh plant being bought, intermixed with the old, and repaired; books and accounts kept without any reference to the provisions making *Evans, Merry & Co.* mere hirers of plant, but treating the plant, old and new, as their property, and debiting them with the price of additions purchased from *N. and R. Guthridge & Co.*, and in some instances from others.

On the 21st of March, 1860, three several deeds were executed, on the occasion of Mr. *Williams* advancing £10,000, and coming into the concern as a lender of that sum, entitled to it and interest, and as a partner, entitled

to a share of the profits. *Evans* and *Merry* ceased to be partners, but were allowed annuities, and to have a tenth each of the profits of the contract from beginning to end. The partnership, as regarded the Government and public, became *Williams & Little*, the former being entrusted generally with the partnership property, funds, &c., and the latter representing the capitalists *Guthridges* and *Webb*, or Messrs. *Hawthorne*, *Whitney*, and *Copeland*, trustees under a trust for creditors of the *Guthridges* and *Webb*. One of those three deeds of the 21st March, 1860, the deed of assignment executed by all the parties in this cause, is material as to the subject now before me. It was in it stipulated that the plant, chattels, and effects then being upon the railway, or the offices or premises lately occupied by the firm of *Evans, Merry & Co.*, should be valued by some competent person in the usual manner, and that such an assignment of the plant, &c., as thereafter contained should be made to *Williams*, and that the amount of such valuation should, on the completion of the contract, less certain debts, monthly payments to *Evans, Merry*, and others, and interest, be paid by *Williams* and *Little* to *Hawthorne, Whitney*, and *Copeland*, as the trustees of the estate of *N. and R. Guthridge & Co.* The same deed contained a formal assignment by *Evans* and *Merry* to *Williams* of their shares in the contract for his own benefit, subject to any agreement which might be made between *Williams* and *Little* as to the interest or property in, or title to, the same; and another formal assignment by *Little*, with the consent and by the direction of *Hawthorne, Whitney, Copeland, Guthridges*, and *Webb*, to *Williams*, of the plant, &c., then being upon the railway, &c., to hold for his own benefit absolutely, but subject to any agreement that might be made between *Williams* and *Little* as to the interest or property in, or title to, such plant.

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—  
Judgment.

On the whole this deed treats the plant, &c., at the time of its date as the property of *Little*, representing the

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 v.  
 GUTHRIDGE.  
 —  
*Judgment.*

capitalists, not as the property of *Evans, Merry, and Little*, and transfers it to *Williams*, as the legal depository of the new firm of *Williams & Little*. It is conformable to the deed of the 24th December, 1858, in treating *Little* as theretofore owner, letting plant on hire to *Evans, Merry & Co.*, but confounds the intermediate plant as in the same position.

The value of the plant, at March, 1860, being treated, and properly, for the purposes of our accounts, as an outlay then incurred for the contract, and the value of the plant at the close, as an asset of the contract, I do not see how the purchase of plant in the interval could be regarded as outlay during the interval. It has been argued, on the other hand, that the value of the plant was to be applied partly in payment of debts of *Evans, Merry & Co.* But property of much larger amount theretofore belonging to *Evans, Merry & Co.*, was assigned, subject to the same debts; and some of the debts were, by the same deed, treated as open to doubt, as to which of the parties they should be ultimately charged against. The deed contains various adjustments between the parties, and cannot, I think, be controlled by this provision for debts, as to the manner in which it treats the ownership of the plant at the time of its execution.

So far as the question involved in the exceptions relates to the purchase of plant, I think it decided by the deeds, but I feel considerable doubt and difficulty as to the repairs. The rent of £100 a month was quite inadequate compensation for the use of the plant, feeding the horses, and repairs. But the deed of December, 1858, was an entire bargain, and we cannot properly isolate this item to judge of its reasonableness. The rent being totally inadequate even as interest upon purchase-money of plant, I do not think we can properly bring the inadequacy forward as an argument for charging the repairs to the partner-

ship. If it prove anything, it is that the rent for plant was not really the meaning of the parties to the deed; but in that aspect we must reject it as parol evidence to vary the deed. A similar observation applies as to the manner in which the partnership books were kept, and partnership bills being given for purchased plant. Besides that, I do not think there is evidence to bind the present Plaintiffs from the books or the dealings of *Richard Guthridge* by their cognizance of, or acquiescence in, either. The requisitions from the Plaintiff *Evans* to *N. and R. Guthridge & Co.* for various additions to plant, relate merely to the liability of the firm of *Evans, Merry & Co.* for them—not to the liability of the latter partners between themselves; so as to purchase from others. I do not think the letter of the 10th December, 1858, from the bookkeeper of *Evans, Merry & Co.*, nominated by *R. Guthridge*, to *Little* the trustee of the capitalists, should affect the Plaintiffs. On the other hand, the Plaintiffs have produced some letters from *Richard Guthridge* to them complaining of their purchasing plant from others than his house, and generally speaking as dictator upon the subject of such purchases. These have been used as tending to prove that the capitalists were to be at the expense of furnishing plant, and *Evans* and *Merry* had no interest in it. As to this argument, I think the letters should be referred rather to *Guthridge*, as principal capitalist, having assumed the offices and powers of *Little*, the partner, and trustee of the capitalists, and, therefore, arrogated the powers of financier against the working partners.

With considerable hesitation and doubt on the question regarding repairs, I have come to the conclusion that the Master's decision should be affirmed, the profits treated as £97,584 9s. 1d., and the exceptions overruled with costs.

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 —  
 Judgment.

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Argument.

The cause now came on for hearing upon further directions.

Mr. *Bunny* and Mr. *Holroyd*, for the Plaintiffs, asked for a decree for payment of the sums found due by the Master's report, with interest from the completion of the contract. [*Molesworth, J.*—As to interest this is an unliquidated demand, and it is not usual to give interest until ascertainment of the amount.] The Plaintiffs are also entitled to their costs since the original hearing. The decree should be general against all the Defendants, leaving them to adjust amongst themselves out of what fund the Plaintiffs' demand should be satisfied. *Adley v. The Whitstable Company (j)*, *Ryle v. Haggis (k)*, *Pearce v. Creswick (l)*, *Bartlett v. Wood (m)*, *Pledge v. Buss (n)*.

Mr. *Atkins* for the Defendant *James Webb*.—If Mr. *Webb* is liable to pay the Plaintiffs the amount found by the Master, the trustees, *Hawthorn*, *Whitney*, and *Copeland*, ought to indemnify him, and pay the amount out of the funds in their hands. Although in form he is personally liable to the Plaintiffs, the clear intention of the parties was that they should be paid out of the proceeds of the contract, which are in the hands of the trustees. *Earl of Ripon v. Hobart (o)*, *Oldaker v. Hunt (p)*.

Mr. *J. W. Stephen* and Mr. *Webb* for the Defendants *Hawthorn*, *Whitney*, and *Copeland*.—The right of the Plaintiffs was upon the original hearing of this suit, determined to be a personal one against the Defendant *Webb* alone. There is no evidence in this suit of any agreement between him and the trustees for any indemnity, or that, in fact, the trustees have any funds out of which to

(j) 17 Ves., 315.

(k) 1 J. &amp; W. 234.

(l) 2 Hare, 286.

(m) 30 L. J. Chy., 614.

(n) 6 Jur., N.S., 695.

(o) 3 Myl. &amp; K., 176.

(p) 19 Beav., 485. S.C. on app.

6 De G. M. &amp; G., 388.



indemnify him. The only decree that can now be made is a personal one against *Webb*, or the bill may be dismissed without prejudice to filing another. In any event the trustees are entitled to their costs as against the Plaintiffs, who may possibly be entitled to have them over against *Webb*.

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—  
*Argument.*

Mr. *J. W. Stephen*, for the Defendant *Williams*, asked that the bill as against him might be dismissed with costs.

Mr. *Bunny* in reply.

*Cur. adv. vult.*

MR. JUSTICE MOLESWORTH:—

*September 15.*

*Judgment.*

I need not repeat the complicated facts of this case, which I have had several times to state.

Before 21st March, 1860, the Plaintiffs were in partnership with *Little* as contractors, the last being alone authorised to receive and disburse the partnership funds. On the formation of the new partnership of *Williams & Little*, the Plaintiffs retired, each receiving annuities payable until the completion of the contract, being secured in a sum equal to the tenth of the profits throughout, and indemnified against losses; all this being arranged by one of the deeds of the 21st March, 1860; and the only security provided for the Plaintiffs being the bond of *Little*. *Little* himself, however, was in both arrangements, though one of the contractors as to the Government, only a trustee for others, and an agent paid by commission, and, of course, to be indemnified from liability under the bonds. The interests of the first capitalists by assignments became vested in the two *Guthridges* and *Webb*, and these being in embarrassed circumstances had, in Feb-

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*Judgment.*

ruary, 1860, assigned all their property to *Hawthorn, Whitney, and Copeland*, but remained entitled to the overplus, if any.

The deed of 21st March, 1860, provided for the application of the funds to be received from the Government under the contract, in payment of the debts of the former partnership and partners as to some, expressly leaving the question of ultimate liability open. If the overplus were made payable simply to the trustees of the deed of February, there should be, I think, no doubt that they should indemnify *Little* before paying the creditors of the *Guthridges* and *Webb*; but the deed of the 21st March, 1860, made the interest of £45,000, theretofore retained by the Government, payable to the *Guthridges* and *Webb*, and directed the subsequent proceeds of the contract, after various specified deductions, to be in trust for the persons entitled under a deed of the — day of —, 1859. As to this last provision, a question has been started whether it means a trust for the *Guthridges* and *Webb*, who were literally the persons entitled under the deed of the — day of —, 1859, or their assignees, the trustees of the deed of February, 1860. And this question only seems to me to raise another, whether *Little* should be indemnified from the bonds by the *Guthridges* and *Webb*, or by their assignees.

By a deed of the 8th July, 1861, *Webb* was brought into a new relation, substituted for *Little* as managing the affairs of *Williams* and *Little*, and giving his covenant to the Plaintiffs to pay and do that which *Little* was bound by bond to pay and do; and *Little's* bonds were given up, and thereupon *Webb* would be entitled to be indemnified in the same manner as *Little* theretofore was.

The bill in this case alleged that the *Guthridges* had by fraudulent representations induced the Plaintiffs to exe-

cute the deed of the 21st March, 1860, and accept the personal security of *Little* first, and afterwards *Webb*. It prayed accounts between the parties in all complications, and payments of the share of the profits to the Plaintiffs by the Defendants respectively; that the deed of the 21st of March, 1860, should be set aside for fraud, as between the Plaintiffs, *Guthridges, Webb, Hawthorn, &c.*, and that Plaintiffs should have a lien on the funds payable by Government. After the argument of a motion to dissolve an injunction, I held that the alleged fraud of the *Guthridges*, if proved, would not avoid the deed as to *Hawthorn, &c.*, and therefore discharged the injunction. The Plaintiffs then by notice abandoned so much of the relief sought as impeached the deed of the 21st March, 1860, and claimed a lien on the funds, and sought and obtained a decree for an account of the sums equal to a tenth share of the profits payable by *Webb* to them.

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Judgment.

No case was ever attempted, nor, as I at present think, could have been successfully urged, for the Plaintiffs to get at the parties ultimately liable to indemnify *Webb* through him; but I thought the other parties should properly be kept before the Court during the accounts against *Webb*, so as to preclude them from disputing against *Webb* the propriety of any demand recovered by the Plaintiffs; and subsequently in the office, *Hawthorn, &c.*, have been the principal litigants with the Plaintiffs. I have now no materials to decide liability between *Webb* and the co-defendants. No account has been taken of payments to the different creditors provided for by the deed of March, 1860.

In passing, I may say that I think the Master under the decree should have given *Webb* credit for any payments to creditors of the Plaintiffs provided or warranted by that deed; and I act on the assumption that there were no such payments. Reverting to my lack of infor-

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 ———  
*Judgment.*

mation, I have no evidence where the funds which should be applied to indemnify *Webb* are—whether with the Government, the Bank of New South Wales, *Williams*, or the trustees of the deed of February, 1860, or elsewhere.

On the whole, I do not feel myself warranted in decreeing anything but payment by *Webb* personally. I think he should further be charged with interest at eight per cent. from the date of the Master's report, and with the Plaintiffs' costs of the accounts in the Master's office and of this hearing. The parties ultimately liable insist that they can be reached only by further litigation, and those not so liable had no interest in the accounts, so I think all the Defendants should be left to abide their costs of the accounts, and of this hearing.

I wish to notice some arguments which have been offered from the language of the deeds. The words in the deed of the — day of —, 1859, "subject to the claims "and demands of the Government of Victoria, under the "contract, and to the claims and demands of the said *Evans* "and *Merry* under the said partnership deed of the 24th "December, 1858;" give no lien to the Plaintiffs. They practically meant that *Little* should, before accounting with the *Guthridges* and *Webb*, indemnify himself from his liability to the Plaintiffs. In a passage in the deed of the 8th July, 1861, "as a personal liability on the said *James Webb*, but so as not to render any other parties hereto "liable in this respect, and without prejudice to the "existing liabilities of any other parties, the said *Webb* "shall and will pay to the said *Evans* and *Merry* the "salaries covenanted to be paid to them by *Williams* and "*Little* in the deed of the 21st March, 1860, and also the "proportion of profit arising out of the said contract and "accruing to them thereunder, and also will make provision for the settlement of all debts and liabilities of the "said firm of *Evans, Merry & Co.*," &c., the words, "with-

"out prejudice," &c., may relate to the latter provision. As to the former, they can create no right, and the only previous liability to the Plaintiffs, that of *Little*, was definitely determined in other parts of this deed.

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EVANS  
v.  
GUTHRIDGE.  
Judgment.

"Declare that the Plaintiffs respectively are entitled to the sums of £9,753 8s., being one-tenth part of the profits of the contract entered into by the articles of the 22nd July, 1858, as reported by the Master. Order the Defendant *James Webb* to pay the said sum, with interest thereon at the rate of £8 for every £100, by the year, from the date of the Master's report, 28th July, 1864, until paid to the Plaintiffs respectively within three months. Order the said *James Webb* also to pay to the Plaintiffs their costs of the accounts in the Master's office and of this hearing within the same time referred to. Let Defendants respectively abide their own costs since the former hearing. Declare this decree to be without prejudice to the right of the Defendant *James Webb* to have indemnification or contribution from others."

CRUTHERS v. WHITE.

THE Plaintiff moved upon notice for an injunction to restrain mining operations upon auriferous land, demised by him to the Defendant *White*. The bill alleged that upon the creation of the tenancy it was expressly agreed that the land should be used exclusively for agricultural purposes. That the Defendant *White* had lately asked the Plaintiff's permission to mine for gold, which had been refused. That the Defendant *White* had nevertheless since permitted a number of Chinamen to mine for gold upon the land, and had entered into agreements with such Chinamen, and particularly with one *A Sing* (who was made a Defendant) as their headman or superintendent for carrying on such mining. That the said Chinamen had ever since been and were then actively engaged in mining on the Plaintiff's land under colour of

September 15.

A. let land to B., who sublet part to C. C. entered into an agreement with D., under which D. entered and committed waste. On a bill by A. against B. and D. only, to restrain waste,

Held, that C. not being a party to the suit, no injunction could be granted as to the land sublet to him.

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Statement.

the Defendant *White's* permission, and that they had already excavated numerous holes by which they exposed the land to inundation, and thereby and by covering the surface with material taken out of such holes would render part of the land totally unfit for agricultural purposes and destroy the whole or the greater part of the land as a farm. That gold had been removed from the land. That the names of the Chinamen, other than the Defendant *A Sing*, were unknown to the Plaintiff, and that he had been unable to discover the same, but that they all acted under the directions of the said *A Sing*, in pursuance of some agreement between them and the Defendant *White*. The Plaintiff submitted that they were sufficiently represented in the suit by the said *A Sing*, and prayed that the Defendants and their respective servants, agents, and workmen, and all persons claiming under them, or either of them, might be restrained from mining in the land or from removing gold therefrom, and from making any holes or excavations in the land other than for agricultural purposes only; and for an account of all gold already taken from the land, and of the loss or damage already caused by mining.

The Defendant's affidavits stated that there was no such express agreement against mining as alleged by the Plaintiff. That the agreement in writing between the Plaintiff and Defendant *White*, which was set out, contained no stipulation on the subject of mining. That part of the land demised had been mined before his tenancy commenced, and the soil rendered totally unfit for agricultural purposes. That mining operations were only conducted upon one acre out of forty-seven demised, and that such operations could not be productive of any injury to other portions of the land, nor to the portion upon which the same were conducted, which had been already worked. That the land mined had been sub-let by the Defendant *White* to *Walker* (not a party to the suit) and that he had

entered into the agreement under which the Chinamen, of whom *A Sing* was "headman," were at work.

1864.  
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v.  
WHITE.  
—  
*Argument*

Mr. *J. W. Stephen* (Mr. *Quinlan* with him), in support of the motion. Mining upon the land destroys its value for agricultural purposes, and is an act which no lessee can legally commit except under express agreement with his lessor. It is an act of waste causing irreparable injury to the land, and may be restrained by a Court of Equity.

Mr. *Holroyd contra*.—The agreement being an open one, and part of the land having been already used for mining purposes, and rendered useless for any other, it is only reasonable to suppose that the Defendant took it with the intention of mining upon it. The affidavits shew that there is no damage done or likely to be done to any land not already mined. When lands in which there are open mines are let the mines may be worked by the tenant, although leave be not expressly given him. The case is analogous to that of a tenant for life who may without waste work mines already opened. *Clavering v. Clavering* (q), *Viner v. Vaughan* (r), *Woodfall's Landlord and Tenant*, 8th ed., p. 482. The sub-lessee *Walker* not being a party to the bill, no injunction can issue as to the land sub-let to him, and it is that land only which is being mined.

Mr. *J. W. Stephen* in reply.—An injunction will not be refused for want of parties whom it might be necessary to bring before the Court at the hearing. We ask an order similar to that made in *Wellesley v. Mornington* (s).

MR. JUSTICE MOLESWORTH.—I shall not express any opinion upon the question raised as to the rights of a tenant to carry on mining on land already mined, which

*Judgment.*  
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(q) 2 P. Wms., 388.

(r) 2 Beav., 466.

(s) 11 Beav., 180.

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 —  
*Judgment.*

has been with other land let to him without any express agreement having been come to on the subject. I cannot, in the absence of Mr. *Walker*, grant an injunction affecting the land which was sub-let to him. He has a right to be heard on a matter which might seriously prejudice him. As to the remainder of the land, however, I will grant the injunction prayed.

*Injunction granted, except as to one acre sub-let to Walker. Costs to be costs in the cause.*

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MICHAEL v. WAKEFIELD.

*Sept. 7, 22.*

*M.*, trustee for *W.*, a married woman, made advances to her on her promise to repay him out of the rents of the trust property. *M.* and *W.* afterwards mortgaged. On bill by *M.* against *W.* to enforce his charge, *W.* was ordered to give up possession to *M.*, who, subject to the rights of the mortgagee, was to retain the rents in satisfaction of his advances, interest, and costs.

THE Plaintiff instituted a suit against the Defendant, a married woman, seeking to charge her estate with sums advanced to her on the security of certain land and houses to which she was entitled in fee for her separate use and of which the Plaintiff was trustee. After the advances, the Plaintiff and Defendant concurred in mortgaging the property, and the Plaintiff sought to establish his charge against the equity of redemption. The mortgagee was not a party to the suit. The Defendant had obtained a protection order under the "*Divorce Act*," subsequently to the advances being made to her, and her husband, who was out of the jurisdiction, was not made a party.

The cause was heard on the 24th of May, and by the decree the Plaintiff was declared entitled to a charge on the separate estate of the Defendant in the joint property for advances made by him, and to interest thereon, and a reference was ordered to take an account of what was due. The Master reported the sum of £336 3s. to be

*Semble.*—In giving relief to the creditors of a wife's separate estate such relief will not be confined to decreeing payment out of rents and profits, but a sale of the *corpus* of real estate may be directed.



due, and the cause now came on to be heard on further directions.

The Defendant, who had appeared at the hearing and attended the taking of accounts, did not appear.

1864.  
MICHAEL  
v.  
WAKEFIELD.  
Statement.

Mr. *T. a'Beckett* for the Plaintiff.—The Defendant has absolute dominion over the trust property; the Plaintiff is declared entitled to a charge over it, and the charge should be satisfied in the ordinary manner by a sale. Although in giving relief to the separate creditors of a married woman the English Courts do not as yet appear to have ordered a sale of the *corpus* of real estate, but to have ordered debts to be paid out of income only such limitation of the relief is founded on no principle. The better opinion seems to be that if the wife's interest were such as in the present case, a sale would now be directed on a creditor establishing his debt against her separate estate. *Lewin on Trusts*, 4th ed., p. 498. The relief given to such a creditor is spoken of as a species of equitable execution. In this colony at law a creditor can sell the *corpus* of real estate; in England he cannot. The equitable remedy should therefore, follow the legal, and be in both instances more extensive than in England; and here a creditor should be permitted to receive the amount of his debt by a sale. That the Court of Chancery would direct a sale, if in England a judgment creditor could sell real estate under an execution, is shewn by the case of *Nantes v. Corrock* (†), *Lewin on Trusts*, p. 499.

Argument.

*Cur. adv. vult.*

MR. JUSTICE MOLESWORTH :—

September 22.  
Judgment.

I doubted whether in this case the Plaintiff was entitled to a sale. The older authorities have given the remedy

(†) 9 Ves., 182.

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MICHAEL  
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WAKEFIELD.  
—  
Judgment.

only against rents and profits ; but it has been argued, in conformity with the view laid down in *Levin on Trusts*, that such a restriction would not be recognised at the present day. On this point I have referred to *Owens v. Dickenson* (r), *Murray v. Barlee* (w), *Burke v. Tait* (x), *Bolden v. Nicholay* (y), *Pemberton v. McGill* (z), *Vaughan v. Walker* (a), *Vaughan v. Venderstegen* (b), but I do not consider that any of these cases would justify me in extending the remedy, except upon the ground suggested of following the analogy of an execution at law ; and as the position of a judgment creditor in this colony is superior to that of a judgment creditor in England as to real estate, in an ordinary case of a creditor establishing his claim against the separate estate of a *femme coverte*, I should consider it competent to this Court to direct a sale of her estate to satisfy the debt. However, in the present suit the bill alleges an agreement to pay the debt out of rents and profits only, and I cannot, therefore, give the Plaintiff more extensive rights than he asserts by virtue of the specific charge. I shall, therefore, direct payment out of rents and profits only. As the Defendant is in occupation as mortgagor, I shall direct her to give up possession to the Plaintiff, who, subject to the rights of the mortgagee, may continue in possession until his charge is satisfied.

“ Declare that the Plaintiff is entitled to the sum of £336 3s., and interest at 10 per cent. from July 1 last, according to report, and to the costs of this suit, as a charge upon the estate and interest of the Defendant in the premises contained in the indenture of 11th July, 1859. Refer it to the Master to tax costs. Declare that the Plaintiff is entitled to receive and apply the rents and profits. Order the Defendant, if in possession, to give up the quiet and peaceable possession of the premises to the Plaintiff, and not to interfere with the possession of him or persons to whom he may let the same ; his possession to be without prejudice to the right of the mortgagee under the indenture of 26th July, 1860, in the pleadings mentioned ”

(v) Cr. & Ph., 48.

(w) 3 My. & K., 209.

(x) 10 Ir. Chy. Rep., 67.

(y) 3 Jur., N.S., 1884.

(z) 29 L. J., Chy. 499.

(a) 8 Ir. Chy. Rep., 458.

(b) 2 Drew., 182.

MORTIMER v. BRAITHWAITE.

1864.

Sept. 15, 22.

THIS Suit, to administer the will of — *Mortimer*, deceased, now came on for further directions. Under the will the testator's widow had an absolute power of appointment of new trustees.

When the Court has taken the management of a testator's property into its hands, a power in the will to appoint new trustees cannot properly be exercised without its sanction.

Mr. *Holroyd* for the Plaintiffs, the widow and children, applied for the appointment of Mr. *W. H. Donaldson* and Mr. *C. A. Donaldson* as trustees, in the place of the Defendants *Braithwaite* and *Greaves*.

Mr. *J. W. Stephen* for these Defendants consented, upon their being allowed their costs of this suit.

MR. JUSTICE MOLESWORTH.—There may be some doubt whether, Mrs. *Mortimer* having an absolute power of appointment of new trustees, it is necessary that such an appointment should be made by the Court.

*Cur. adv. vult.*

MR. JUSTICE MOLESWORTH.—Upon this cause coming on for further directions an application was made for the appointment of new trustees. Mrs. *Mortimer*, who is a co-plaintiff and tenant for life, has the absolute power of appointment of new trustees given her during her life; and she is now desirous of having new trustees appointed. I think the application is properly made to the Court for that purpose, for when once the Court has taken the management of the property into its hands, the power to appoint new trustees cannot properly be exercised without its sanction. I have referred upon this point to the cases of *Webb v. The Earl of Shaftesbury* (*h*), — *v. Robarts* (*j*),

September 22.

Judgment.

(*h*) 7 Ves., 480.

(*j*) 1 J. & W., 251.

1864.  
 MOERTIMER  
 v.  
 BRAITHWAITE  
 —  
*Judgment.*

*Kennedy v. Turnley* (k), and *Middleton v. Reay* (l). I therefore think the Court should exercise a discretion in this case as to the appointment of new trustees. The materials at present before me are not, however, sufficient to enable me to exercise a discretion as to the fitness of the gentlemen named.

(k) 6 Ir. Eq. Rep., 399.

(l) 7 Hare, 106.

PITTMAN v. TOWNSHEND.

*Sept. 15, 22.*

Where a receiver, appointed at the instance of the Plaintiff, left the colony and the Plaintiff took no steps for the appointment of a new receiver,

*Held*, that a Defendant, an annuitant, whose annuity was in arrear, was entitled to move for the appointment of a new receiver; and that the Plaintiff, although rightly served with notice of the motion, was not entitled to his costs of appearing upon it.

IN this Suit a decree was made in the year 1861 for the administration of the testator's estate. Prior to the decree a receiver had been appointed who, about twelve months since, left the colony. The testator's widow, a Defendant in the suit, was entitled to an annuity charged on the estate, but which had been left unpaid since the receiver left. The annuitant now moved on notice to the Plaintiff for the appointment of a new receiver.

Mr. J. W. Stephen for the moving Defendant.

Mr. Holroyd, for the Plaintiff, did not oppose the motion, but asked for costs.

*Cur. adv. vult.*

MR. JUSTICE MOLESWORTH.—Under the circumstances *Sept.* of this case I think it certain that the Defendant, the *Judge* annuitant, has a right to be heard, to complain that there is no receiver, and that her application for the appointment of a new receiver ought to succeed. Also, as the receiver was obtained originally by the Plaintiff the moving Defendant was right in serving him with notice of the application. But the occasion for her moving

is the neglect of the Plaintiff in leaving matters as they have been with reference to the receiver; and for that reason I do not think he should have his costs of appearing upon this motion. I will refer it to the Master to approve of and appoint a new receiver; and order steps to be taken to compel the late receiver to account for any balance of his receipts not yet accounted for. The applicant to obtain her costs of the motion; and the parties appearing on the notice of motion to abide their own costs.

*Order accordingly.*

1864.  
PITTMAN  
v.  
TOWNSHEND.  
*Judgment.*

KENDELL v. THOMSON.

1864.  
October 24.

A SUIT on behalf of a married woman originally brought against her father as trustee, and the Colonial Bank of Australasia, claiming to be mortgagees of the father, to enforce the trusts of a marriage settlement made by the husband on the daughter to her separate use for life; and for an account, and the appointment of new trustees. The suit up to the decree was defended only by the Bank. Part of the case made by the bill was that the father had expended rents received as trustee, in improperly purchasing the husband's life interest in remainder. The decree established the settlement as against the mortgagees, declaring that the bank's charge was subject to the equities of the Plaintiff; and it gave an account as against the Defendant *Thomson*. The decree further directed, according to the consent of the bank, that on the bank depositing the deeds of the mortgaged property with the Master in Equity, and paying the Plaintiff's costs up to the decree, they should be dismissed from the suit, and they were dismissed accordingly. As the

Where a Defendant through poverty is unable to attend in the Master's office when accounts are taken against him, this is no ground for permitting him to re-open those accounts, and if relief be given him it will only be upon payment both of the costs of the account and of the application.

A report will on the application of any party to the suit, be referred back

to the Master when his finding is unauthorised by the decree and opposed to the case made by the bill.

1864.  
 KENDELL  
 v.  
 THOMSON.  
 —  
*Statement.*

Defendant *Thomson* never appeared, the account was prosecuted in the Master's office by the Plaintiff alone. Due notice was, however, given to the Defendant of all proceedings in the Master's office. The Master presented his report, bringing in the Defendant *Thomson* a debtor to the trust estate in a sum exceeding £1,000, and finding that the Defendant had made the purchase of the life interest in remainder on behalf of the trust. On the report being presented for confirmation, a motion was made by the Defendant *Thomson* on notice to the Plaintiff, asking that the report should be sent back to the Master as finding upon a matter not included in the reference; or that the accounts against the Defendant should be taken over again in the Master's office, he having been prevented by his poverty from obtaining the necessary professional assistance and papers from a former solicitor to enable him to attend the taking of accounts; and he alleged that several items had been improperly charged against him, and that he had not been credited with sums paid on account of the trust. The motion now came on to be heard.

*Argument.*  
 —

Mr. *Billing*, in support of the motion, contended that the Defendant's affidavits clearly shewed errors in the accounts by which he would be seriously prejudiced, and that on the other branch of the case the report had not only assumed to deal with matters not submitted to the Master, but had done so in opposition to the case made by the bill.

Mr. *Laures* *contrà*.—The proceedings have been regular, and the Defendant has been served with notice of them; if he had objected to the report, he should have excepted to it. Where this course is not taken, the confirmation of the report cannot be objected to. *Otley v. Pensam* (c). And after confirmation a report will only be reviewed on the ground of fraud. *Daniell's Chy. Prac.*, 2nd ed., p. 1241. The bill puts the case of the purchase of the life estate in

(c). 1 Hare, 322.

the alternative, and asserts that it was made by the Defendant out of trust money either for himself, or, as he pretends, on behalf of the trust. Though the purchase is an improper one, the *cestuis que trustent* may adopt it if they choose, and follow the trust moneys into their investment. The Master was, therefore, at liberty to treat the purchase as made on account of the trust. If the report were in any particular *ultra vires*, or disposed of matters not raised by the pleadings, the Court would disregard these findings on the cause coming on for further directions, but would not on that ground refuse to confirm the report. *Rufford v. Bishop* (d).

1864.  
KENDALL  
v.  
THOMSON.  
—  
*Argument.*

MR. JUSTICE MOLESWORTH referred to *Armstrong v. Storer* (e), *Jenkins v. Briant* (f), and *Ganderton v. Ganderton* (g).

Mr. *Billing* in reply.

MR. JUSTICE MOLESWORTH:—

*Judgment.*

I feel some embarrassment in dealing with this case. The motion is presented in two branches—one, on the ground of the poverty of the applicant; and the other, on the ground of the irregularity of the report. As to the first ground, the applicant had all legal notice, and full opportunity to attend the reference in the Master's office, and resist the charges now objected to. No excuse was made for the Defendant's not having availed himself of such opportunities except his alleged poverty. I cannot be ignorant that poor people occasionally suffer from their ignorance and inability to purchase legal advice; but the rules of law and the practice of the Court cannot be strained to meet their cases. However harsh it may sound, courts of justice cannot assume in such cases as this that all parties had not sufficient knowledge of the course of

(d) 5 Russ., 360.

(f) 6 Sim., 303.

(e) 9 Beav. 277.

(g) 13 Ib., 202.

1864.  
KENDALL  
v.  
THOMSON.  
—  
*Judgment.*

the proceedings, and sufficient understanding of the effect of such proceedings, and sufficient opportunity to appear if such appearance were deemed expedient. The proceedings must therefore be deemed regularly taken. Moreover, I cannot say, on the affidavits before me, that a single item in this case shews a probability of substantial success to the applicant on a review of the account.

If, therefore, the report were to go back to the Master, it could do so only on an indemnity to the Plaintiff as to costs. I can see that ultimately there will be a balance due from the Defendant to the estate in any event. If so, on that part of the case, relief will be given only on payment both of the costs of the account and of this application. But in the other branch of the case the applicant is in a more favorable position. The Master's report has been taken, on the proceedings of which the Plaintiff alone had the carriage, in such a way as to puzzle all parties, establishing a trust not sought by the bill, and giving credit for the purchase-money. It would be hard to deal with the husband's life estate in remainder as the separate estate of the wife. The report extends to the purchase of the life estate, a matter not referred to the Master by the decree; and as to such matter, it is framed on a basis inconsistent with the case made by the Plaintiff's own bill. That places the matter in such a position that, if the suit were prosecuted on the report, it is impossible to see how the Court could adjust the complications likely to arise at every future stage.

The Defendant may, at his option, either have the report sent back on all points, he paying the costs of the reference and report and of this application as a condition precedent; or have the report sent back for review as to the purchase of the life estate by the Defendant, without costs, the Defendant then to get no credit for the purchase money. Defendant to exercise his option within one week.



KENNEDY v. THE QUEEN.

May 18, 25.  
September 19,  
20, 26.

**P**ETITION under the Act No. 49, for specific performance by the Crown of an alleged contract for sale to the Petitioner of allotment 85, in the agricultural area of Glen Johnston, parish of Towanway.

The petition stated that Crown lands comprising, *inter alia*, the allotment in question, were, by proclamation dated the 7th August, 1862, declared open for selection under the provisions of "*The Land Act 1862*," on and after the 10th September, 1862; that the Petitioner, by written application on the 10th September, 1862, applied to be the selector of allotment 85, by purchase of subdivision A, and by a lease of subdivision B, thereof; made the declaration required by the Act; delivered the application and declaration to the land officer, paid him £68 12s. 6d., being the purchase-money for subdivision A, and one year's rent in advance for subdivision B, and received from the land officer a receipt and certificate, as follows:—

"Received from Mr. John Kennedy the sum of sixty-eight pounds twelve shillings and sixpence sterling which in the event of his application accompanying this payment being successful is to be considered as the purchase-money for subdivision A allotment 85 in the parish of Towanway and as one year's rental in advance for subdivision B of the same allotment.

"A. W. MUSGROVE Land Officer.

"£68 12s. 6d."

Crown lands were by proclamation dated 7th August declared open for selection on and after the 10th September. By a subsequent proclamation, dated on the 8th, but gazetted only on the 11th September, certain allotments were, under the 46th sec. of the Land Act, withdrawn from selection "on account of improvements." On the 10th of September, K. applied to select one of these allotments, paid to the land officer the purchase-money for subdivision A, and one year's rent in advance for subdivision B, and received

from him a receipt and certificate of selection.

On petition by K., under the Act No. 49, for specific performance of the alleged contract for sale to him,

*Held*, that the reason assigned for withdrawing the land was sufficient; that the land was effectually withdrawn from selection on the 10th September by the order of the 8th, although not published until the 11th, and petition dismissed with costs.

Whether a proclamation speaks from its date or from the time of its publication—*quære*.

1864.  
 KENNEDY  
 v.  
 THE QUEEN.  
 —  
*Statement.*

"The person named in this receipt is certified to be the selector of  
 "the allotment herein specified in consideration of the sum for which  
 "the receipt was given.

"A. W. MUSGROVE, Land Officer.

"Dated 11/9/62."

The petition, after submitting that such proceedings constituted a valid contract for the sale of the fee of subdivision A, and for a lease of subdivision B, further stated that the Petitioner entered into possession and expended large sums of money in substantial and valuable improvements, but that in February, 1863, he received a letter from the Board of Land and Works, for the first time informing him that the allotment selected by him was, with others, withdrawn from selection by a proclamation dated the 8th of September, 1862. That on the 31st July, 1863, the Petitioner paid to the land officer £53 7s. 6d., being the difference between the amount of rent previously paid in respect of subdivision B and the entire sum of £1 per acre for such subdivision, and received a receipt as follows :—

"No. 202.

"Victoria, Warrnambool,  
 "31st July, 1863.

"Received from Mr. *John Kennedy* the sum of fifty-three pounds  
 "seven shillings and sixpence sterling being balance due on lot 85  
 "Towanway area Glen Johnston

"A. W. MUSGROVE, R. of Rev.

"£53 7s. 6d."

And by virtue of such further payment became the purchaser of subdivision B, as well as subdivision A, and entitled to a Crown grant thereof. The petition then alleged application to the Board of Land and Works for Crown grants of subdivisions A and B, and refusal to give them or complete the contract; and stated a pretence by the Board that by virtue of the proclamation above mentioned the allotment in question was withdrawn from selection, and that the selection and purchase by the Peti-

tioner was void; but alleged that such proclamation was not published until the 11th of September, 1862; and submitted that the proclamation could not have a retrospective effect, and was moreover invalid, inasmuch as it did not purport to withdraw the allotment from sale or selection on any of the grounds, or for any of the reasons, upon or for which the Governor in Council was by the Act authorised so to withdraw land.

1864.  
KENNEDY  
v.  
THE QUEEN.  
—  
Statement.

The answer of the Attorney-General admitted generally the facts stated in the petition; relied upon the proclamation dated the 8th September, 1862, and published in the *Government Gazette* of the 11th September, 1862, as effectually withdrawing the land from selection; denied that any contract was entered into between the Government and the Petitioner; and offered to refund the moneys paid by the Petitioner.

The proclamation withdrawing the land from sale was as follows:—

“ AGRICULTURAL LANDS WITHDRAWN FROM SELECTION.

“ PROCLAMATION.

“ By his Excellency Sir *Henry Barkly*, Knight, &c., Captain-General  
“ and Governor-in-Chief of the Colony of Victoria, &c., &c.

“ In pursuance of the authority in me vested by ‘*The Land Act*  
“ ‘1862,’ I do hereby notify and proclaim that with the advice of the  
“ Executive Council I have withdrawn from selection the allotments of  
“ agricultural lands hereinafter mentioned, that is to say:—

“ ON ACCOUNT OF IMPROVEMENTS.

“ Agricultural area of Glen Johnston, parish of Towanway, allotments  
“ 11, 20, 45, 83, 84, 85.

&c.,                      &c.,                      &c.

“ Given under my hand and the seal of the colony  
“ at Melbourne this 8th day of September  
“ A.D. 1862 and in the 26th year of Her  
“ Majesty’s reign.

“ (L.S.)

HENRY BARKLY.

“ By his Excellency’s command

“ C. GAVAN DUFFY

“ President of the Board of Land and Works.

“ GOD SAVE THE QUEEN.”

1864.  
 KENNEDY  
 v.  
 THE QUEEN.  
 —  
*Argument.*

Mr. J. W. Stephen and Mr. Webb for the Petitioner.— Under “*The Land Act 1862*,” the system adopted for disposing of Crown land is one of offer and acceptance. The lands are offered by the Crown to the public by the proclamation of their being open to selection, and upon the acceptance of that offer by any of the public a contract is knit between the Crown and the selector. There is such a contract between the Crown and the Petitioner in this case, which he is entitled to have specifically performed. This was conceded by the Crown in *Allnutt v. The Queen* (*h*), and the only difference between that case and the present is that here the Crown allege that the land was withdrawn from selection by the proclamation in the *Government Gazette* of the 11th September. That proclamation purports to be dated on the 8th September, but no evidence has been given of its having been passed by the Governor-in-Council on that date; and it does not appear to have been inserted in the *Gazette* until the 11th, although then inserted as a second supplement to the *Gazette* of the 9th, itself published after the alleged date of the Order in Council. It can, therefore, only operate from the 11th, for a proclamation only takes effect from the date of its publication. *Chitty on Prerogative*, 106.

It is admitted by the answer that the land officer who signed the receipt and certificate was the duly constituted agent of the Government for that purpose; and there is no evidence that his agency was revoked prior to the selection by the Petitioner. To constitute a valid revocation of his authority notice of such revocation should have been given to him, and also to the public dealing with him; but no such notice was given in this case, and the Crown is bound by the act of its agent, and the receipts and certificate he has given to the Petitioner. Treating the proclamation as a retrac-

(*h*) 2 Wy. & W. E., 135.

tation of the offer of this land to the public, it was too late, for that offer had already been accepted. In *Adams v. Lindsell* (i), it was held that an offer by letter, accepted by return of post, was sufficient to constitute a binding contract, although in the meantime the offer had been withdrawn. The section of the Land Act authorising the withdrawal of the land (sec. 46) evidently contemplates that the proclamation withdrawing shall be issued before the time fixed for selection, and shall not have a retrospective effect, for it says "may withdraw any land about to be selected, rented, or purchased."

1864.  
KENNEDY  
v.  
THE QUEEN.  
Argument.

But even if the proclamation is to be regarded as operating from the 8th September, it is invalid, inasmuch as it purports to withdraw the land from selection for a reason not within the provisions of the Act. "*The Land Act 1862*," sec. 46, empowers the Governor in Council to withdraw land from sale "as being auriferous or mineral, or as having a water frontage, or as being in other respects improper either at that time or generally to be sold." Here the general words must be limited to cases *ejusdem generis* with those previously enumerated. *Fenton v. Skinner* (j). But the reason assigned for withdrawing this land is "on account of improvements," which is not *ejusdem generis* with any of the specified causes for which land may be withdrawn under sec. 46; and therefore the proclamation, even if in time, was *ultra vires*, and had not the effect of withdrawing this land from sale, and the Petitioner is entitled to a specific performance of his contract.

Mr. Moore and Mr. Holroyd for the Crown.—No proclamation was necessary to withdraw this land from selection. The 14th section of the Land Act requires the opening for selection to be by proclamation, but sec. 46, giving power

(i) 1 B. & Ald., 681.

(j) 1 Wy. & W. L., 65.

1864.  
 KENNEDY  
 v.  
 THE QUEEN.  
 —  
*Argument.*

to withdraw land from selection, does not require any proclamation. This land was therefore well withdrawn by the order of the Governor in Council of the 8th September, even although that order was not published until the 11th. The *Government Gazette* of the 11th, containing the order of the 8th, is by the *Evidence Act* [No. 100], sec. 39, evidence that the order in council withdrawing this land was duly made on the date on which it purports to have been made.

The reason assigned in the order for the withdrawal of this land is sufficient, and the land having been validly withdrawn from selection on the 8th September, the subsequent selection by the Petitioner on the 10th was invalid and void.

Mr. J. W. Stephen in reply.—The Crown itself has considered it necessary that the withdrawal should be by proclamation, for it has purported to adopt that method of withdrawal.

*Cur. adv. vult.*

*May 25.*  
 —  
*Judgment.*

MR. JUSTICE MOLESWORTH :—

Certain lands in the direction of Warrnambool were proclaimed open for selection under "*The Land Act 1862*," section 14, by *Gazette* of August, 1862, from September the 10th. The *Gazette*, published on September the 11th, 1862, contains an order of the Governor in Council, as under section 46 of the same Act, dated September the 8th, withdrawing the lands in question from sale on the ground of there being improvements on them. The Petitioner, on the 10th of September, lodged with the proper officer an application paper and money—£1 an acre for one moiety, and 2s. 6d. an acre for the other moiety of the land—and proceeded regularly, so as to

entitle him to rights in them, under the 16th and subsequent sections, and would now be entitled thereto, unless barred by the order of September the 8th, and his petition is filed in assertion of that right.

1864.  
KENNEDY  
v.  
THE QUEEN.  
Judgment.

The Petitioner first insists that the order of withdrawal was ineffectual, as the Governor in Council had no power to withdraw lands once proclaimed for sale, because improved. The words of the section 46 are "may withdraw from sale as being auriferous or mineral or having a water frontage or as being in other respects improper either at that time or generally to be sold any land about to be selected rented or purchased." This point has been argued on the principle that general words in an Act, coming after enumeration of particulars, are controlled by the particulars as instances, so as to be limited to things *ejusdem generis* as those. Amongst the numerous cases illustrating this, I have been referred to *Fenton v. Skinner*. There an enumeration of "rivers, stores, bridges, ferries, &c., or other purposes for the public advantage or convenience," was held not to include farms or dwellings. The general words "public advantage" would not mean by themselves an aggregate of individual advantages; and the instances given fortified, if necessary, that construction. But here the words used are "in other respects improper." What are we to suppose the genus indicated by the instances auriferous or mineral, or having a water frontage? The first and last might be argued upon as pointing to public utility respectively, or supporting gold-mining industry, or affording a supply necessary for beasts travelling or grazing upon neighboring lands; but the second word, embracing mines of iron, copper, salt, coal, &c., never dedicated to public use, makes me think that the genus is lands of such peculiar value that they should not be given to any one who might get them by priority of application or lot at £1 an acre. The first and third instances are equally consistent

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v.  
THE QUEEN.  
—  
*Judgment.*

with that meaning as to the genus. Now, land being improved by art and rendered more valuable, affords as good a reason as natural advantages for its not being sold at gross undervalue. Besides, I should be sorry to say that, in cases of land being in fact withdrawn for reasons not warranted by the Act, and ordinary selectors stopped, individual selectors of more combativeness might insist that they had a right to take so much public property. I would say that the restriction was directory to the Government.

Assuming the withdrawal to be warranted, I have to consider whether it was in this case effectually exercised. It has not been disputed that the *Gazette* of September the 11th, affords evidence (under No. 100, section 89) that the Governor in Council made an order, on the 8th of September, withdrawing the land. Such order, if made on the 8th, appears to me effectual to prevent all attempted subsequent sales. Section 46 says nothing of orders being gazetted. Gazettes are modern inventions, unknown to the common law; and, therefore, regal or vice-regal ordinances do not derive their efficacy from being gazetted save under the special provisions of Acts of Parliament. Individuals may have notice of Government acts never gazetted, and may not have notice of those which are. The order in question was apparently too long postponed, but was promulgated with no unreasonable delay in the *Gazette*, the ordinary and best means of promulgation. But there is nothing in the Act to make promulgation essential to the validity of the order. It is the duty of the Governor in Council in cases like this, generally to make and promulgate orders in such time as not to cause inconvenience or hardship to persons acting in ignorance of them. But I cannot say that public property is to be bound by such breach of duty (where it exists), or the negligence of officials delaying the information of the Governor, or transmission of his orders. I cannot import



into Acts of Parliament, conferring upon individuals the means of acquiring public lands by sale from the Government, the doctrines of principal and agent in sales by private persons, and say if any of a series of officials through whom such matters pass neglect to give a timely notice to a sub-agent authorised to sell, of the withdrawal of his authority, that therefore the sale is invalid.

1864.  
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v.  
THE QUEEN.  
Judgment.

In the present case, I have no reason to say that the petitioner, purchasing in ignorance of the order, suffered any real material hardship or inconvenience. He has thought a property of small value, if measured by the purchase-money, £122, a subject worthy of this suit. I do not think him entitled to succeed. I think he should pay the ordinary penalty of unsuccessful litigation—costs.

*Petition dismissed with costs.*

The petitioner appealed to the full Court (k) from the judgment of the primary Judge upon the following grounds :—

Sept. 19, 20.  
Appeal.

“ 1. That his Honor ought to have made a decree in favor of the said suppliant for the specific performance of the contract in the petition herein mentioned and which contract was entered into on behalf of Her Majesty's Government with the said *John Kennedy*, and ought not to have dismissed the petition of the said suppliant with costs.

“ 2. That it did not appear by any evidence in this suit that the land mentioned in the said petition was legally or in fact withdrawn from selection.

“ 3. That if withdrawn in fact the said land was not so withdrawn before the said *John Kennedy* had become entitled thereto as the selector under the provisions of ‘ *The Land Act 1862.*’

“ 4. That if such land was legally withdrawn the fact of such withdrawal was not communicated to the said suppliant or to the public until after the title of the said suppliant as such selector had been

(k) *Coram Stowell, C. J., Barry, J., and Williams, J.*

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 ~~~~~  
 KENNEDY
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 ———
*Argument on
 Appeal.*

completed nor until he upon his part had fully performed his contract for the purchase of the land as such selector.

" 5. That his Honor was of opinion that the recognised doctrines of principal and agent in sales by private persons are not applicable to sales under the said Act but the said Government was as the said suppliant submits bound by the Acts of its ostensible agents being within the apparent authority of such agents.

" 6. That it appeared by the admissions in the answer herein of Her Majesty's Attorney-General that the land officer in the petition mentioned was and continued to be after the alleged withdrawal of such land the duly authorised agent of the Government for receiving payment of the purchase-money for such land and which purchase-money was actually received by him accordingly.

" 7. That Her Majesty's Attorney-General insisted in and by his said answer that the said land was withdrawn from selection by virtue of a certain alleged proclamation in the said answer mentioned but his Honor held that the said land was legally withdrawn from selection by a secret order in Council not promulgated until after the suppliant's title had accrued and no such case was made by the said answer of Her Majesty's Attorney-General."

Mr. J. W. Stephen and Mr. Webb, for the Appellant, cited in addition to the cases cited in the Court below, *Story on Agency*, sec. 470; *Chitty on Contracts*, 196; *Trueman v. Loder* (l), *Salte v. Field* (m), *Ex parte McDonnell* (n), and *Bailey v. Collett* (o).

Mr. Moore and Mr. Holroyd for the Queen, Respondent.

Mr. J. W. Stephen in reply.

Cur. adv. vult.

September 26. THE CHIEF JUSTICE:—

*Judgment on
 Appeal.*

Two questions arise on this petition; first, whether the Governor in Council has the power to withdraw land

(l) 11 A. & E., 589.

(m) 5 T. B., 215.

(n) Buck, 399.

(o) 18 Beav., 179.

from selection under the circumstances here stated ; and next, whether, having the power, he, in proper time, exercised it.

Lands were proclaimed open for selection on and after the 10th September. By the same proclamation, an officer was appointed to receive the purchase-money of lands duly selected. By a subsequent proclamation, dated on the 8th, but not gazetted until the 11th September, the land which is the subject of this petition was, under the 46th section of the Land Act, withdrawn from selection. It was urged in argument that, according to the spirit of this Act—an argument which in an economical view it is difficult to appreciate—the Legislature intended the land not to be sold for its value, but got rid of at any risk and for any amount, in order to procure a settlement of the country, and that the Governor had no power to withdraw the land from selection excepting for the purposes specifically enumerated. In this instance the Governor withdrew the land because of its value. There may be clauses which may support the view suggested, but this clause 46 cannot, we think, bear that construction. Plenary powers are given by it, and unless it is assumed that those powers are to be exercised improperly, it is obvious that they may prevent inconvenience, and yet cause little, if any, actual injury—at most, mere disappointment. Their exercise may prevent the issue of a grant by mistake or surprise, and the necessity for a *scire facias* to repeal such a grant after it has been issued. The principle of *ejusdem generis* relied on in argument does not apply, for the reasons pointed out by the primary Judge. The land, we think, could have been withdrawn.

It was urged that the withdrawal was too late, that a proclamation speaks from the date of its publication, not from the date on which it is made ; and that to hold otherwise would subject to great hardship persons resi-

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THE QUEEN.
—
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Appeal.*

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 KENNEDY
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 —
*Judgment on
 Appeal.*

dent in the country and at a distance from Melbourne where proclamations are issued, if they were to be held affected by notice of a fact which they could not know; and that to withdraw from the hands of the agent the authority by which he acts, and not give notice of the withdrawal to all those who were invited to deal with the principal through the agent, would be a breach of good faith and a violation of equitable principles.

There may be some force in these objections, but it is unnecessary in our opinion to consider them. It may be questionable whether a proclamation speaks from its date, or from the time of its publication; or whether, from the peculiar wording of section 46, a proclamation before actual alienation by the Crown would not be in sufficient time. But, as a matter of fact, the Governor, acting with the advice of his Executive Council, has withdrawn this land from selection. He, as the trustee for the general public, has declared in the most formal manner that, in his opinion, the alienation of these lands would not be right as regards the interests of the public generally. The Court possesses no power to compel the Governor to withdraw that proclamation, issued on sufficient grounds—to compel him to commit a breach of trust to the colony. We know of no instance in which a Court of Equity will enforce specific performance where such performance will necessarily involve the committal of a breach of trust—in fact, compel that which a Court of Equity itself of all acts most seeks to prevent.

No case of peculiar hardship is made out by the petition. If the Act enabling subjects to sue the Crown had expressly enabled an action to be brought for damages, no doubt could arise that the present suppliant should be left to such action at law. If, however, the Act does not enable a suit to be maintained, on which point we express no opinion, still the petitioner is not without redress.

Other modes are open to him. His payment of the balance of the purchase-money after he received a letter informing him that the land had been withdrawn, points rather to his making a grievance, than to his having then actually suffered an injury. He appears to cling with peculiar tenacity to this land—for what reason does not appear. According to the evidence, it is doubtful whether he has suffered any injury beyond the loss of the interest of his money—an injury which sounds in damages, and is capable of compensation at the hands of a jury. Without saying what remedy he possesses, or whether he has any, he must be left to such other redress as he may be advised. The judgment of the primary Judge is affirmed, with costs.

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KENNEDY
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—
*Judgment on
Appeal.*

Appeal dismissed with costs.

IN THE MATTER OF THE ST. KILDA AND BRIGHTON
RAILWAY COMPANY, AND IN THE MATTER OF
"THE COMPANIES STATUTE 1864."

October 14,
15, 27.

PETITION under "*The Companies Statute 1864*" by the Bank of New South Wales and other judgment creditors of the St. Kilda and Brighton Railway Company, praying that the company might be wound up under the provisions of the Act, on the ground that the company was "unable to pay its debts" (*p*).

The provisions of "*The Companies Statute 1864*," relative to winding-up companies do not apply to a Railway Company incorporated by Act of Parliament.

The St. Kilda and Brighton Railway Company was originally incorporated by the Act No. 42, which Act was

"*The Companies Statute 1864*," for winding-up a company within the provisions of that Act, it is discretionary with the Court to grant the prayer of the petition.

On a petition under "*The Companies Statute 1864*," for a winding-up Order, a company, neither a creditor nor a contributor of the company sought to be wound up, is not entitled to be heard.

On a petition under

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subsequently altered and amended by the Acts Nos. 73 and 127. Under the provisions of these Acts the railway was constructed and opened for traffic, and the line is still being worked by the company. The company having become indebted to a large amount to various creditors, in June, 1863 an order *nisi* was obtained for the compulsory sequestration of the company under 11 Vic., No. 19. After argument, this order was discharged by his Honor Mr. Justice *Molesworth*, and such discharge affirmed by the full Court on appeal, on the ground that the Act 11 Vic., No. 19, did not apply to railway companies (*q*). "*The Companies Statute 1864*," having been subsequently passed, this petition was now presented under that Act. The evidence relied on of the company being unable to pay its debts was that a writ of *fi. fa.*, sued out by Messrs. *Klingender, Charsley & Liddle*, judgment creditors of the company, endorsed to levy the sum of £1271 12s. 6d., was, on the 29th September, 1864, returned by the Sheriff unsatisfied (*r*).

Argument.

Mr. *J. W. Stephen* and Mr. *Holroyd* for the Petitioners.—Although it has been held that this company did not come within the provisions of the old "*Winding-up Act*," 11 Vic., No. 19, we submit that it does fall within the terms of "*The Companies Statute 1864*," sec. 176. By that section "Any partnership association or company consisting of more than five members and not registered under this Act may be wound up under this Act." These words are large enough to include the case of a railway company. In the analagous English Act, 25 and 26 Vic., cap. lxxxix., sec. 199, railway companies incorporated by Act of Parliament are expressly excepted from the operation of the Act, but the words excepting such companies from the Act are omitted in the Colonial Act; and it is therefore to be presumed that it was the intention of the Legislature that

(*q*) *Vide In re St. Kilda and Plevins*, 2 Wy. & W., I. E. & M. Brighton Ry. Coy., *Ex parte* 69.

(*r*) Sec. 176 (4) c.

such company should be included in our Act. This company has been insolvent for years, and the creditors have no remedy except to seize the rolling stock, which is totally inadequate to pay the debts of the company. In *Furness v. The Caterham Ry. Coy.* (s), an inquiry was directed "whether any and what means can be taken for the purpose of making the railway available for payment to the Plaintiff, and the other incumbrancers of the amounts due to them respectively;" and in Chambers it was arranged that the railway should be sold, and an Act of Parliament was obtained authorising the sale (t). Such a course might be followed in this case; and the liquidators, when appointed, apply for an Act authorising the sale of the railway.

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Argument.

Mr. Bunny, for the St. Kilda and Brighton Railway Company, against the Petition.—This question has already been decided twice against the Petitioners—first by your Honor, and then by the full Court on appeal—and the principle and policy of law upon which those decisions went has not been altered by the recent Act. The title of the Act under which this petition is presented is "*An Act for the Incorporation Regulation and Winding-up of Trading Companies and other Associations*"—that is, other associations *ejusdem generis* with trading companies. This company is not a trading company. Even as carriers they would not be "traders" except by the express enactment of the bankrupt laws. The cases cited upon the previous argument of *Ex parte Burge* (v), *Ex parte Spackman* (w), *In re St. James's Club* (x), and *In re The Direct London and Portsmouth Ry. Coy.* (y), apply equally to the present application. "*The Companies Statute 1864*," is inapplicable to an incorporated railway company, inasmuch as the statutory powers conferred by the Act of incorporation are incapable

(s) 25 Beav., 619.

(t) 27 *Ib.*, 359.

(v) 1 De G. & S., 588.

(w) 1 De G. & S., 599.

(x) 2 De G. M. & G., 383.

(y) 12 Beav., 269.

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of being transferred to, or exercised by the liquidators, if appointed, or any purchaser from them. It is admitted by the Petitioners that if an order for winding up this company be made it will be necessary to have an Act of Parliament to carry it out. Possibly Parliament might refuse to pass such an Act, and this Court will not make any order which would be dependent for its effectual working upon the obtaining of an Act of Parliament.

Mr. Wood, for the Melbourne and Suburban Railway Company, proposed to address the Court in opposition to the petition.

Mr. J. W. Stephen.—The Melbourne and Suburban Railway Company is neither a creditor nor a contributory of this company, and has no right to be heard upon this petition.

Mr. Wood.—The Acts of incorporation of the two companies, Nos. 42 and 43, give power to the companies to make traffic arrangements between them. Such arrangements have been made and are now in force, and the company for which I appear is materially interested in opposing any steps being taken which will interfere with these traffic arrangements during their currency.

Mr. JUSTICE MOLESWORTH.—Unless there is something in the Act under which this petition is presented which recognises your right to be heard, I do not think I can hear you. My impression is that under this Act I ought not to hear you.

Mr. C. A. Smyth and Mr. Webb (with them Mr. Ireland, Q.C.) for Mr. George Holmes, a creditor of the St. Kilda and Brighton Company, against the petition.—Upon the authority of the cases already cited this company does not fall within the provisions of "*The Companies Statute*." But

if the Court should be of opinion that it does come within that Act, still it is discretionary with the Court to make a winding-up order or not. *Ex parte James* (z), *Ex parte Phillips* (a), *Ex parte Guest* (b). In the exercise of this discretion the Court will consider, in the case of each company coming before it, whether it is necessary or expedient to apply to it the machinery of the Act. *Ex parte Wise, In re London Conveyance Company* (c). Having regard to the nature of this company, and the public obligations to keep open the railway for traffic, we submit that in this case it is not expedient to grant the petition, even if the Court should be of opinion that it has jurisdiction to do so.

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Mr. J. W. Stephen in reply.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

October 27.
Judgment.

In this case several creditors of the company, including some who have issued ineffectual executions against it, have petitioned for its winding-up, under "*The Companies Statute 1864*" (No. 190), secs. 176, &c. ; and it is admitted that, if this were an ordinary joint-stock company, the Petitioners would be entitled to wind it up as insolvent, and the proceedings for that purpose are regular. But the objections on behalf of the company, and other creditors of it, which I have had to consider have been upon the peculiarities of its character under its Act of incorporation, No. 42, varied by No. 127.

A petition by a creditor for the compulsory sequestration of the property of this company, under the Act 11 Vic.,

(z) 1 Sim. N.S., 146.

(b) 5 De G. & S., 464.

(a) *Ib.*, 615.

(c) 1 Drew., 465.

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No. 31, was dismissed by me on the 6th of July, 1863. My decision was appealed from, and affirmed by the full Court during the appeal sittings in September, 1863. My decision was based upon the inconsistency of the application of the provisions of the Act 11 Vic., No. 19, with the rights and interests of the public and others under Nos. 42 and 127, coupled with the creation of this company being by Act subsequent to 11 Vic. The full Court relied more on the former ground—not advertent to the latter. Without recapitulating, I may say, generally, that all those arguments, except that of the dates of the Acts, apply as strongly against the application of the provisions of No. 190.

The Act No. 42, sec. 50, provides that “ Nothing herein “ contained shall be deemed or construed to exempt the “ railway authorised by this Act to be made from the pro- “ visions of any Act relating to this Act, or of any Act rela- “ ting to railways in this colony which may hereafter pass “ during the present or any future session of the Legisla- “ ture, or from any future alteration or repeal of this Act “ under the authority of the Legislature.” It is beyond the power of Parliament to make an Act unalterable by subsequent Acts ; but I am inclined to think that Parliament may provide, and did by these words provide, that an Act may not be altered by subsequent sweeping words, such as provisions in No. 190, sec. 176, for “ any partnership association or company consisting of more than five “ members and not registered under this Act ; ” that No. 42 could be altered only by an Act expressly referring to it, or relating specifically to railways. Section 51 of the Act No. 127 affords an argument similar to this. An argument has been based on this Act No. 190, sec. 176, having been nearly copied from the Imperial Act 25 and 26 Vic. cap. 89, sec. 199, which expressly excepts from its operation “ railway companies incorporated by Act of Parliament,” and this exception not being in our Act, that there-

fore railway companies, &c., should be affected by it. I think this class of argument untenable. Our law-makers must be taken to accept or adopt words submitted to them as explaining themselves, not strengthened or weakened by their similarity to or dissimilarity from the words used by other law-makers. Even if we were to speculate upon the mind of the person who took the Imperial Act for a precedent, I think it might be as fairly argued that if he intended to affect railway companies he would have said so expressly, especially after the litigation and decisions about this company in 1863, to which I have adverted. There is an Imperial Act for winding up railway companies; the last, I believe, 13 and 14 *Vic.*, cap. 83, which protects the public interests as well as those of creditors, landholders, &c., by provisions which, or similar to which, should reasonably be made before dissolving a railway company in this country. On the whole, I am inclined to think the Act No. 190 inapplicable.

But if the Act applied, the prayer of this petition is for the discretion of the Court, as shewn by the cases cited in argument, of *In re James*, *In re Phillips*, and *Ex parte Guest*. As far as I am informed, the capital of this company has been all paid up and expended. There are no debts of consequence due to it by its members or others. It is not alleged that its income is diminished by mismanagement, or applied in payment of claims over which the Petitioners should have priority. A liquidator, if appointed, would have no cash property to realise; even if he could carry on the traffic, he could not increase its productiveness; and he could not sell, as I think. My making an order to wind up would inflict heavy costs and per centage to a liquidator; and I do not see any definite prospect of advantage to the applicants, other creditors, or the members. It has been virtually admitted that the affairs of this company can be wound up only by a private Act of Parliament authorising a sale of the railway itself, and creating a new proprietary

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 —
Judgment.

for its management. If there is an occasion for a private Act, if there is a *dignus vindice nodus*, I do not see that I would assist such cutting of it by granting the prayer of this petition.

I am not disposed to give costs against undisputed creditors, thwarted in all other efforts for obtaining payment.

Petition dismissed without costs.

M'CRAE v. RUTHERFORD.

November 8.

Upon motion for the appointment of a guardian *ad litem* to infant Defendants, if any of the infants are of an age of discretion, there should be an affidavit of their assent to the proposed guardian.

MR. MOLESWORTH moved for the appointment of Mr. John Brown as guardian *ad litem* to the infant Defendants. The motion was made upon affidavits that Mr. Brown was a fit and proper person to be guardian *ad litem*, and had no adverse interest to the infants.

MR. JUSTICE MOLESWORTH.—If any of the infants are of an age of discretion, I should wish to have an affidavit of their assent to the proposed guardian being appointed.

It appearing that the eldest infant Defendant was 17 years of age, his Honor directed the motion to stand over for an affidavit of his consent to the party named being appointed guardian *ad litem*.

M'MECKAN v. WHITE.

1864.

December 1.

MOTION under 9 and 10 *Gul.* 3, cap. xv., to have a submission to arbitration and award made a rule of Court.

The Plaintiffs, Messrs. *M'Meckan, Blackwood & Co.*, commenced a suit against the Defendants. A *ne exeat* was obtained. The Defendants paid a certain sum into Court, after which a submission was drawn up, and the question submitted to arbitration, and the arbitrator decided in favor of the Plaintiffs.

Mr. *Holroyd*, for the Plaintiffs, in support of the motion.

Mr. *Harris*, for the Defendants, *contra*.—The submission provides that application should be made to the "Supreme Court of Victoria." It being now in Term, and the full Court now sitting *in banco*, application should have been made to the Court *in banco*. The award is simply for payment of a sum of money, and there is no necessity for applying to a Court of Equity, and costs are increased by such an application. Further, the submission alone ought to be made a rule of Court.

Where a submission provided that application to make it a rule of Court should be made to the "Supreme Court of Victoria," such application may even in Term, and when the full Court is sitting *in banco*, be made to a single Judge sitting in Equity; and when an award has been made the award as well as the submission should be made a rule of Court.

His Honor ordered that the submission and award be made a rule of Court.

Order accordingly. No costs.

IN THE MATTER OF THE MELBOURNE AND NEW-
CASTLE MINMI COLLIERY COMPANY, AND IN
THE MATTER OF "THE COMPANIES STATUTE
1864."

1864.

December 8.

On the hearing of a petition under "The Companies Statute 1864," for an order to wind up a company, the Court will not at the instance of Plaintiffs in a suit against the company give leave to proceed with the suit notwithstanding the winding-up order, but such application must be brought forward as a substantive motion after the winding-up order has been made.

PETITION under "*The Companies Statute 1864*," for an order to wind up the company by the Court.

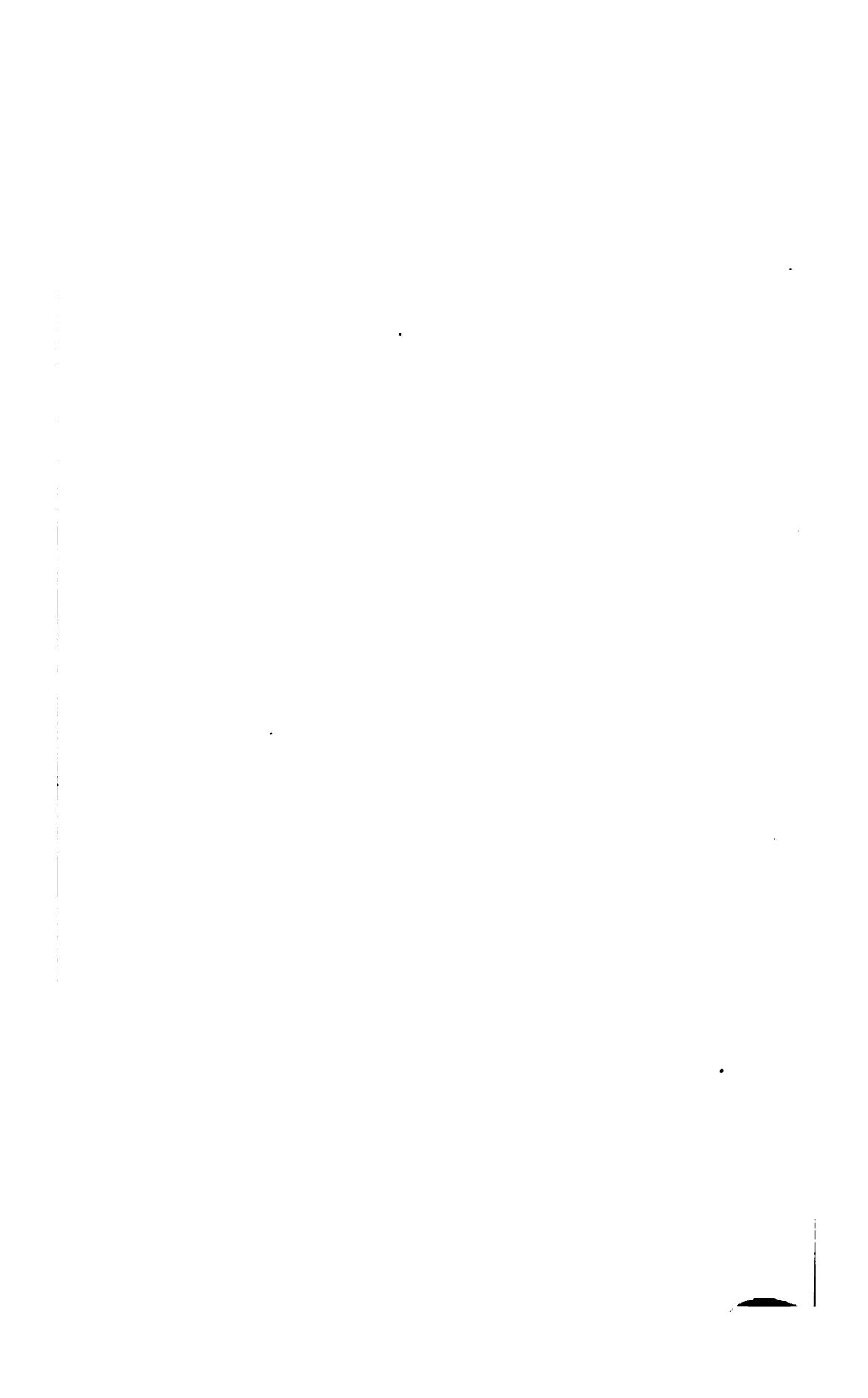
Mr. J. W. Stephen, Mr. Wood and Mr. Fellows in support of the petition.

No appearance on behalf of the company.

Mr. T. A'Beckett, for certain shareholders who had commenced a suit against the company and its directors, applied under sec. 79 of "*The Companies Statute*" for leave to proceed with the suit notwithstanding the winding-up order. [*Molesworth, J.*—The words of that section are—"When an order has been made." In this case no order has as yet been made for winding up the company.] Instead of allowing the winding-up order to be made, and then asking for an order in a measure contradicting or limiting its effect, the Plaintiffs in the suit already instituted ask that the terms of the order to be made for winding up the company may be such as to permit the suit to proceed.

Mr. JUSTICE MOLESWORTH.—I do not think I can grant Mr. A'Beckett's application upon the present occasion. It must, I think, be brought forward as a substantive motion after the winding-up order has been made. There may be clauses in the Act giving all the relief sought for by the suit. I will make the order for winding up the company in the form No. 3, in the 7th schedule to the Act.

Order accordingly.



CASES
 ARGUED AND DETERMINED
 IN THE
Supreme Court of Victoria,
 AT LAW,
 IN
 EASTER TERM, 27 VICTORIÆ.

The Judges who sat in Banc in this term were—

STAWELL, C. J.

WILLIAMS, J.

BARRY, J.

THE COUNCIL OF THE BOROUGH OF BALLAARAT,
 APPELLANT, v. O'CONNOR, RESPONDENT.

APPEAL stated, under the Act No. 159, by a Court of
 Petty Sessions at Ballaarat.

O'Connor, inspector of weights and measures at Ballaarat,
 sued the borough council, for that they were indebted to him,
 "as such inspector," for work and labor done for the borough,
 at their request. The particulars of demand were as follow:—

1864.
 March 21.
 Whether,
 under the Act
 No. 151, a
 weighing-
 machine of
 capacity to
 weigh over
 56 lbs. need, so
 far as the
 owner is
 concerned, be
 compared and *stamped* by the inspector, *quære*.

Under the Act No. 151, the owner of every weighing machine is compelled to have
 it true and correct, and it is the duty of the inspector to examine and *compare* every
 machine on payment by the owner of the proper fees; and in comparing a machine
 capable of weighing over 56 lbs., the inspector may use other weights besides the
 standards supplied by the Government, if such additional weights have first been verified
 by the standards.

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 v.
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" Oct. 8.—To examining and comparing your weighbridge,	
" and five counterpoises thereof, each of which, at the	
" end of beam or steelyard, equals two tons weight,	
" the capacity of the bridge being twelve tons	£6 0 3
" Oct. 5.—To examining, comparing, and stamping said	
" weighbridge and weights	6 0 3
" Carriage of weights	1 0 0
	<hr/>
	£13 0 6"

The borough council applied in July to the inspector to compare and stamp the market weighbridge. The inspector said he had not then "a sufficiency of standard weights." He applied to the Government for the requisite number of weights. He could not get them^(a). He "borrowed some weights, and hired others, which were duly compared with the standards in his possession, and duly stamped, with which he supplemented the standard weights then in his custody." Being still short of weights, "he borrowed some bars of lead, the weight of which he duly computed from the standard weights." On the 3rd October, using "the copy standard weights supplied to him by the Government, amounting in all to one hundredweight, together with the weights and lead he had borrowed and compared, amounting altogether to two tons, he compared the weighbridge and found it inaccurate. The council had it rectified. On the 5th October the inspector repeated his operations, and found the weighbridge now correct. He thereupon "stamped it as correct for twelve tons weight," according to the Act. The inspector then, "for legally comparing on two occasions, and stamping said weighbridge," made his claim for the sum of £12 0s. 6d. (above mentioned), "as fees earned and due to him under and by virtue of the said Act;" and also for work and labor, and for carriage of the said weights to the said weighbridge, the same having been done at the request of the council," he claimed the above sum of £1, which last sum the council did not dispute. The council disputed the £12 0s. 6d., contending that the work for which the inspector sued was "illegal, and not done in

(a) Under the Weights and Measures Act, No. 151, the Government supplies only one copy of each standard weight.

accordance with the requirements of the Act," and therefore "not earned and due as fees for work performed under and by virtue of the Act." The bridge had not been legally compared and stamped, because "the weights used in the comparison were not 'authorized copies' of the standard weights, as required by the Act;" and because a large portion of the weights and lead used were "not stamped or marked as such copies" of such standard weights, &c.; and because some of such weights were composed of substances forbidden to be used for the purposes of the Act; and, also, because a weighbridge of such large capacity could not be tested but by equal weight with itself, of twelve tons." The magistrates held the objections of no force, and gave a verdict for the inspector. The borough appealed.

1864.
COUNCIL OF
BALLAARAT
v.
O'CONNOR.

Dawson, for the Appellants.—The Government is to supply to each inspector authorized copies. The inspector is to compare with such authorized copies the weights, &c., which it is his duty to verify. He has not done so. He claims his fees under the Act, and has not done his duty under the Act. The public has a right to see comparison made with "authorized copies." If it looses this guarantee, it looses all the security promised by the Act. If he might use one copy, not an authorized copy, he might use all copies not so authorized. He might verify these unauthorized copies at home in private. It is a sort of adulteration of the pure weights. The inspectors have no right to interpose a middle term between the "authorized copies" and the weights to be compared. As to the material of the weights, the act forbids expressly the use of weights of pewter or lead, not wholly cased with brass, copper, or iron, and branded "cased."

Fellows, for the Respondent.—This case is not within the Act. Section 35 expressly says that nothing in the Act shall require to be compared and stamped, as any single weight or measure, &c., "exceeding the greatest standard weight or measure" obtained from Westminster, and deposited in the

1864.
 COUNCIL OF
 BALLAARAT
 v.
 O'CONNOR.

Custom-house here ; and the greatest standard measure of weight we have here is 56 lbs. Moreover section 12 says that only "one authorized copy" of each weight is to be supplied by the Government to each inspector. It follows, therefore, that if greater weights are compared than 56lb., it must be with unauthorized copies. The penal sections only apply to the extent that standard weights or authorized copies exist. Weights are only illegally without a stamp when the Act makes it possible to stamp, and penal to be without a stamp. The third schedule, fixing the scale of fees, says :—"For examining and comparing balances, &c., including stamping *when necessary.*"

PER CURIAM.—It is unnecessary to decide whether in this case stamping was required. But as the owner is compelled to have his machine true and accurate, provision is properly made for any machines being examined and compared on payment, by the owner, of the fees specified in the last schedule. Although, therefore, it may be a voluntary matter, so far as the owner is concerned, whether a machine capable of weighing, as this was, over fifty-six pounds, should be compared and stamped at all ; yet, so far as the inspector is concerned, he is bound by the Act to compare every machine, no matter of what sort ; and to stamp it when stamping is necessary. As he is furnished with only one authorized copy of half a hundred weight, the mode of comparison he adopted was permissible. The objection cannot be sustained.

The case as stated does not require the court to offer any opinion as to the right to charge two fees for what may be deemed substantially only one comparison ; or as to the right to charge for cartage of the weights.

STICK, APPELLANT, v. HUDSON, RESPONDENT.

1864.
March 21.

APPEAL stated, under the Act No. 159, by a Court of Petty Sessions at Cranbourne.

The Pleuro-pneumonia Act No. 136, did not continue the former Act, No. 123, but expired with it.

John Stick was informed against under the Pleuro-pneumonia Acts (b) for that on the 16th December, 1863, he did "take nine head of cattle into the district of Yallock, which had been proclaimed a clean district, the said cattle not being at that time certified to be free from disease by a commissioner appointed for that purpose, contrary to the Act No. 136."

It appeared that at the time the cattle were brought in by *Stick*, there was not any commissioner who could grant he certificate required by the Act No. 136.

Harris, for the Respondent, being in support of the conviction, began.

Fellows, for the Appellant.—The whole question is whether a conviction under the second of the two Pleuro-pneumonia Acts can take place after the expiration of the first Act, which was only temporary; whether, in fact, the second Act is not a mere adjunct to the first Act, and an adjunct which necessarily expired with that to which it was adjoined. The Act No. 123 was passed 30th April, 1861, and was to continue in force for one year, and thence until the end of the then next session of Parliament. The Act No. 136, consisting of but one section, was passed 14th May, 1862, when the first Act had still many months of further time to continue in force. The second Act therefore operated for many months, and then, with the first, expired. *M^r William v. Adams* (c). General statutes on the same subject matter are to be read as one statute.

(b) No. 123, and No. 136.

(c) 1 Macq., 120.

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STICK
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HUDSON.

Harris, in reply.—The second Act can well stand by itself. It goes beyond the first. For a certain purpose, it continues the first. *Ex parte Higinbotham* (d), *Regina v. Stock* (e).

WILLIAMS, J.—In that case the second statute was passed just as the other was expiring; and the second was workable without the first. Here the first continued in force sixteen months after the passing of the second, and the second is entirely unworkable without the first.

STAWELL, C. J.—It is apparently a *casus omisus*. It seems to have been assumed that the second would have continued the first, but it did not do so.

Appeal allowed, with costs.

(d) 1 D. P. Cas., 200.

(e) 8 A. & E., 405.

RYAN, APPELLANT, v. POLWARTH, RESPONDENT.

March 21.

Under the Acts 16 Vic., No. 40, sec. 20, and No. 176, sec. 249, a second toll is demandable for the same horses and waggon, going in the same direction, on the same day.

APPEAL stated, under the Act No. 159, by a Court of Petty Sessions at Ballaarat.

Polwarth, on the 7th November, 1863, "having previously on the same day paid toll for his four horses and waggon passing on the road from Creswick to Ballaarat; when about to drive a second time the same day—on the same road, and in the same direction—from Creswick to Ballaarat, the same four horses and waggon through the same tollgate," refused to pay toll a second time.

Ryan summoned him for that he did forcibly, with his horses and waggon, pass through the toll-gate; by reason whereof the payment of tolls, to the amount of 2s., was avoided.

The Magistrates held that the second toll was not demandable; and *Ryan* appealed.

1864.
RYAN
v.
POLWARTH.

Fellows, for the Appellant.—We have always assumed that the law is the same here as in England, but it does not seem to be so. *Primâ facie* you pay for the road as often as you use it—just as you pay at a ferry every time. But in England the general Turnpike Act (*f*) empowers the gatekeeper to demand toll “every day,” &c. So that the law in England is founded on an express limitation to one charge in each day, however many times the road may be used. But here there is no such restrictive law. Our law depends on our Roads Act (*g*), and our Local Government Act (*h*). In the first Act the words used are, that the authorities may erect toll-gates, and from time to time direct what tolls shall be payable and collected “for all animals and vehicles passing or re-passing through” such gates; and the second Act empowers the authorities to direct what tolls shall be levied “at any toll-house, toll-gate, or toll-bar,” or any “bridge or ferry,” for “all animals and vehicles passing or re-passing through, by, on, or over the same respectively.” Under these words toll is leviable every time of “passing or re-passing.” As to tickets, they are only for the protection of the public, as evidence of payment in case of a person being sued for not paying at all. *Loring v. Stone* (*j*), *Ramsden v. Gibbs* (*k*). There is no hardship to the public as to amount, for the amount of tolls is subject to revision, and may be lowered so as to make numerous passings at a low rate pay a total only equal to a single passing at a high rate.

No one appeared for the Respondent.

STAWELL, C. J.—It may not have been the general opinion that the toll was demandable in such a case as the present,

(*f*) 38 Geo. IV., cap. cxxvi.

(*g*) 16 Vic., No. 40, s. 20.

(*h*) No. 176, s. 249.

(*j*) 2 B. & C., 515.

(*k*) 1 *Ib.*, 319.

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 v.
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but the words of the Act are distinct, and there is no exception or implication to the contrary, as in the Turnpike Acts in England.

Appeal allowed.

REGINA v. FOSTER AND OTHERS, JUSTICES, AND PREECE.

March 21.

Service of a summons for debt by Complainant at a house he alleges to be the last known place of residence of the Defendant, when the Defendant is really, to the knowledge of the Complainant, gone from the house into gaol, is insufficient service. Execution of a conviction based on a summons so served will be prohibited. If the point was taken below, such prohibition will be with costs against the Complainant below.

ORDER *nisi* for prohibition, obtained from a Judge in vacation, under the Act No. 159, sec. 6.

A summons for debt had been served at a house alleged to be the last known place of abode of the Defendant; but it appeared that the Complainant, who served the summons, knew that the Defendant was not then living at the house, but was in gaol at Pentridge.

Wood, in support of prohibition, cited *Ex parte Price Jones* (l) where *certiorari* was granted by the Bail Court.

No one appeared against prohibition.

Order *nisi* made absolute; and, as the point had been taken below, with costs against Preece, the complainant below.

(l) 1 L. M. & P., 357.

M'EWAN AND OTHERS v. MONCUR.

1864.

March 22.

DEBT against the infant heir in possession of the lands of *Alexander Moncur*, deceased, "for money payable by the Defendant as such heir as aforesaid, for goods sold and delivered by the Plaintiffs to the said *Alexander Moncur*, deceased, in his lifetime; and for money found to be due from the Defendant as such heir as aforesaid to the Plaintiffs on an account stated between the said *Alexander Moncur*, deceased, in his lifetime, and the Plaintiffs" (m).

In an action at law against the heir in possession of lands descended, to recover the debt of the ancestor, it is not necessary to show that the Plaintiff has first exhausted the personality.

The trial was before *Williams, J.* Verdict for Plaintiffs.

The statute 54 Geo. III., cap. 15, sec. 4, gave a new and cumulative remedy at law to the simple contract creditor against the realty, without forcing him, at least at law, to exhaust first his redress against the personality.

Wrixon now moved for a rule *nisi* to arrest judgment, or for a new trial. Part of the goods were sold to the ancestor on three months' credit. He died in one month, and before the credit was expired; therefore no right of action accrued against the ancestor. [*Stowell, C. J.*—Why not? No bill of exchange was given. The ancestor got the goods. A debt accrued immediately, but it was payable after three months only.] Then no right of action against the heir, in respect of the real estate, accrues till the creditor has first exhausted the personal estate. Is the heir to be despoiled of his land, when the ancestor may have left enormous personal estate available for satisfaction of his debts? There must be a legal right to issue execution against the heir, and the Court must see this on the pleadings, or it will arrest judgment. [*Barry, J.*—Could you have demurred?] Yes. On the face of this declaration it should appear that the personality was exhausted. In interpreting a statute we must look to the mischief it was to remedy, and thereby judge of the remedy intended. The mischief at common law was, not that the simple contract creditor had not a capricious double remedy against both the realty and the personality, but that

(m) 54 Geo. III., cap. xv., sec. 4.

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when he had exhausted the personalty he had no further claim at all as to the realty. The statute of Geo. III. cured that mischief by enacting that real estates should be assets for satisfaction of all simple contract debts, in like manner as real estate is by the law of England liable to the satisfaction of debts due by bond or other specialty. [*Stowell, C. J.*—That does not establish any priority, at law. What right does this Court, as a Court of law, possess, of forcing the creditor to his redress against the personalty *first*? There was no redress for a simple contract creditor at law, as against the realty, till it was given by the statute; and now, under the statute, the creditor may have recourse both against realty and personalty, but is not driven to choose either first.] The next point arises on the count for money due on the account stated. If the account was stated with the heir, he is an infant, and an account cannot be stated with an infant. If not with the infant, but with his ancestor, then one party (the infant) cannot be bound on an account stated with another party (the ancestor). *Petch v. Lyon (n)*.

As to the new trial point, there were payments unappropriated by the debtor, and his Honor allowed the creditor to appropriate them to which portions of the debt he liked. That would have been right as between one or another of two accounts, but here there was only one account; and in such case the unappropriated payments must go first to the earliest items in the account. *Bodenham v. Purchase (o)*, *Clayton's Case (p)*, *Goddard v. Hodges (q)*.

In addition, there were also referred to *Wait v. Baker (r)*, *Ferguson v. Carrington (s)*, *A'Beckett v. Mathewson (t)*, *Windle v. Mills (u)*, *Rex v. Jackson (x)*, *Farley v. Bryant (y)*.

(n) 9 Q. B., 147.

(o) 2 B. & A., 45.

(p) Tudor's L. C.; Merc. & Mar.
Law, 16.

(q) 1 Cr. & M., 39.

(r) 2 Ex., 1.

(s) 9 B. & C., 59.

(t) *Ante*, Vol. I., Law, 29.

(u) Sup. Ct. Vic.

(x) 1 Cowp., 297.

(y) 5 N. & M., 42.

STAWELL, C. J.—I do not know whether points precisely similar to the present have been already formally decided; but the law has been considered in so many cases, that it would, in my opinion, be unwise to grant a rule *nisi*. A debt existed the moment the goods were sold and delivered to the ancestor, but the time of payment was postponed. The case of *Farley v. Bryant* is inapplicable. There no debt existed till breach of the covenant, and there was no breach till after the ancestor's death. Here the debt accrued instantly the goods were delivered, and accepted by the ancestor himself.

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As to the objection that it is obligatory on this Court to compel the simple contract creditor to go against the personal estate first, it was considered incidentally in the case of *M'Lelland v. Smith* (2). It may or may not be wise to legislate so as to compel the creditor first to exhaust the personalty, but there is no such rule of law now existing. The statute of Geo. III., in giving the creditor a remedy against the lands of the ancestor, as well as against his personal estate, gave to the creditor a new and cumulative power, without taking away or in any way affecting the other existing right, at least at law. If in asserting his remedy he works any injury, the injured person has a remedy on applying to a Court of equity, which will control the creditor in the exercise of his rights, so that while obtaining the amount of his debt, he works no injury to others. Courts of law have, however, no such power.

The question of the mode of appropriating the sums paid by the debtor to the creditor, in this case, is rendered unnecessary by the opinion already expressed, and need not, therefore, be considered.

Rule nisi refused.

(2) *Vic. Law Times*, 150.

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March 22.

The 11 and 12 Vic., cap. 43, sec. 11, does not merely restrict the Plaintiff's right of procedure, but also limits and defines the jurisdiction of the magistrates; and if facts displacing their jurisdiction under that enactment appear on the Plaintiff's proceedings, it is not necessary to plead such facts as a special defence under the Act No. 29, and the rules promulgated under it.

IN RE PRINCE AND OTHERS, JUSTICES, AND VAUGHAN
AND WILD; EX PARTE BINGE.

RULE *nisi* obtained under the Act No. 159, to prohibit Magistrates in Petty Sessions, and the complainants in a complaint for debt, of *Vaughan & Wild v. Binge*, from proceeding with an order to pay debt and costs, or in default be imprisoned.

The rule *nisi* for prohibition had been obtained on the ground that the complaint in the Court below had not been made "within six calendar months from the time when the matter of such complaint arose," as required by 11 & 12 Vic., cap. 43, sec. 11.

Mackay showed cause.—The above enactment is not a restriction or limitation to the jurisdiction of the magistrates, but is directory only, and goes only to limit the Plaintiff's right of procedure; and it ought, therefore, to have been specially pleaded as a special defence under the Act 21 Vic., No. 29, sec. 35, giving jurisdiction to the Magistrates in this case, and the rules which have been duly made in pursuance of the latter act. He referred to *In re Jones (a)*, *Melville v. Higgins (b)*, and *King v. Lester (c)*.

Billing, for prohibition, was not called on to reply.

The COURT held that sec. 11 of *Jervis's Act (d)*, is not merely in restriction of the Plaintiff's right of procedure, but also in limitation and definition of the jurisdiction of the Magistrates; that such jurisdiction has been conferred on the Magistrates only where the complaint is made within the time

(a) 1 L. M. & P., 65.

(b) *Ante*, Vol. I., Law, 306.

(c) 7 B. & C., 12.

(d) 11 & 12 Vic., c. 43.

named ; and that as the facts displacing the jurisdiction appeared on the Plaintiff's proceedings, it was not necessary to plead them.

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In re
PRINCE.

Rule nisi for prohibition made absolute, with costs as against Vaughan and Wild, the complainants below.

ADAIR, APPELLANT, v. SIMSON, RESPONDENT.

APPEAL stated, under the Act No. 159, by Magistrates in Petty Sessions, at Lexton.

Thomas Adair, district surveyor of Crown lands, laid an information on behalf of the Crown against *Robert Simson*, for that he, "being a purchaser from the Crown by selection, under the Act of Parliament No. 117, of a certain allotment of country lands, to wit, 214a. 2r. 38p., situate at Livingstone, county of Ripon, being allotment 1, subdivisions A and B, in the colony of Victoria, and being the grantee from the Crown of such lands, did not within two years after such purchase as aforesaid effect improvements on said lands, or any part thereof, to the value in pounds sterling equal to one-half the number of acres comprised in said allotment."

March 23.
The Act No. 149, having repealed the Act No. 117, before penalties under the 44th and 45th secs. of it could accrue, and having saved only penalties actually accrued ; no penalties can now be recovered under the above sections of the repealed Act.

The Magistrates held that the Act No. 117 had been repealed by "*The Land Act, 1862*" (e), before any penalties had accrued ; and that none but penalties actually accrued under the former Act, secs. 44 and 45, were saved by the latter Act, sec. 2, and can now be recovered. They therefore dismissed the information.

Harris, for the Crown, Appellant.

(e) No. 145.

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Dawson and Fellows, for the Respondent, were not called on.

STAWELL, C. J.—There are no words to keep alive the former Act during a period in which these penalties might possibly be incurred. If such words had been inserted, then the second section of the latter Act might be applicable.

Appeal dismissed, with costs.

STIRLING, APPELLANT, v. HAMILTON, RESPONDENT.

March 23.

Under the Act No. 159, sec. 11, enacting that the Appellant shall, "within one week after receiving such case, transmit the same" to the Supreme Court, the appeal case must be in the hands of the officer of the Supreme Court within the seven days, or it will have no jurisdiction, and the case will not be heard.

APPEAL stated, under the Act No. 159, by Magistrates in Petty Sessions, at Bring Albert.

Wood, for the Respondent, raised a preliminary objection. The Appellant has not "transmitted" the Appeal within one week, as required by the Act (*f*). The word transmitted does not mean merely the having sent the appeal from the Appellant on its destination; it includes also the meaning that the appeal has arrived at the person or place to whom it is destined. In this case it is not transmitted duly if not in the hands of the officer of this Court within the seven days given by the Act. The dictionaries affirm this view. The Act also affirms it by giving a greater time for transmission here than is given in England by the English Act. See also, *Row v. Williams* (*g*), *Banks v. Goodwin* (*h*), *Ashdown v. Curtis* (*j*), *Pennell v. Churchwardens of Uxbridge* (*k*), *Wodehouse v. Woods* (*l*), *Morgan v. Edwards* (*m*), *Local Board of Health v. Chandler* (*n*), *Peacock v. Reg.* (*o*).

(*f*) No. 159, s. 11.

(*g*) *Ante*, Vol. I., Law, 376.

(*h*) 32 L. J., Q. B., 216.

(*j*) 31 L. J., M. C., 216.

(*k*) *Ib.*, 92.

(*l*) 29 L. J., M. C., 149.

(*m*) *Ib.*, 108; S. C. 5 H. & N., 415.

(*n*) 32 L. J., M. C., 66.

(*o*) 4 C. B., N. S., 264.

Michie, Q.C., endeavoured to distinguish the cases on the English statute, and to show that "transmitting" often means simply "sending from," without meaning also "arriving at."

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HAMILTON.

The COURT regretted the conclusion at which it was necessary to arrive—as seven days would often be insufficient ; but felt bound by the authorities, and obliged to hold that the "case" must be in the hands of the officer of this Court within the seven days.

As there was no jurisdiction in this Court to entertain the case,

Appeal not heard, no costs.

THE COLONIAL BANK OF AUSTRALASIA v. THE
EUROPEAN INSURANCE AND GUARANTEE
SOCIETY.

ASSUMPSIT by the Bank against the Guarantee Society upon a guarantee policy effected by the Bank against losses "by reason, or in consequence, of the wilful default or culpable neglect of *John Hasker*, in or arising out of his employment" in the bank. The bank lost a large sum of money by the embezzlements of a clerk. It was the duty of Hasker to inspect and check the accounts of the clerk weekly. The embezzlements extended over a period of a year. If the inspection had been made weekly, the embezzlements would have been discovered, and the loss of the Bank little or nothing. The Bank sued for its loss as occurring "by reason, or in consequence, of" Hasker's culpable neglect.

March 24.

Where it was the duty of a branch bank manager to inspect weekly the accounts of the clerks under him, and he neglected the inspections ; and in consequence of such neglect the embezzlements of a clerk, extending

through the whole year, were undiscovered, and the bank sustained loss thereby :

Held, that the damage was covered by a guarantee policy against losses "by reason or in consequence of the wilful default or culpable neglect" of the manager "in or arising out of his employment" in the bank.

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The trial was before *Williams, J.* Verdict for Plaintiff; damages £2,000.

Harris moved for a rule *nisi* to set aside the verdict and enter a nonsuit (pursuant to leave reserved) on the ground that there was no evidence of loss coming within the terms of the policy of guarantee. The loss did not arise "by reason, or in consequence, of" *Hasker's* acts. The embezzlement could not be "in consequence" of any default or neglect, because it preceded the alleged neglect—which was, that *Hasker* did not, by inspecting the books each week, find out the irregularities of each preceding week. Nor, in the sense required by law, did the loss arise, "by reason" of his neglect. The neglect must be connected with the loss, in the relation of immediate proximate cause and effect. Now the loss here was not immediately due to *Hasker's* neglect, but to the clerk's embezzlement. [*Stawell, C. J.*—Then if the manager culpably left the door of the bank open, and a person stole the moneys, the loss would not be connected with the manager's act. There the immediate cause of the loss would be that the thief helped himself.] It is impossible to say that the loss occurred "by reason or in consequence" of our neglect, when our alleged neglect followed—that is to say, was consequent after—the loss. [*Williams, J.*—Perhaps as to the loss in the first week that may be so; but surely not so for all the losses afterwards during a twelvemonth.] According to *Ionides v. The Universal Maritime Insurance Company (p)*, the loss here is too remotely connected with the alleged neglect. In that case the master of a ship approached Cape Hatteras after the light had been removed by the Confederate Government. The master was unaware of the removal of the light, and, trusting to see it, ran his vessel ashore, and she was lost. That loss was caused by the removal of the light: yet the Court held that the loss was not due to the removal in the relation of proximate cause and effect. The loss must be occasioned by *Hasker's* own act, not by the acts of others; if it be not by

his own act, it does not in law arise "by reason or in consequence of" his culpable misconduct; it does not flow from it as a consequence. [*Williams, J.*—It seems to me to "rush" from it as a consequence, much more than merely "flow." I am afraid that if we uphold your view, your clients would get no more business.] *Hadley v. Baxendale* (q), *Hoey v. Felton* (r), *Ashby v. White* (s), *Arnold on Insurance*, p. 88; and *Mayne on Damages*.

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STAWELL, C. J.—By the policy on which this action was brought an insurance was effected against losses "by reason or in consequence of the wilful default or culpable neglect of *John Hasker*, in or arising out of his employment" in the bank, as branch manager. It was proved to the satisfaction of the jury that it was his duty to inspect these accounts, and that if he had done his duty he would have at once discovered the commission of the offence. Those inspections should have taken place once a week, but the embezzlements went on undiscovered for over a year. He did not do his duty, and was, in the opinion of the jury, guilty of culpable neglect therein. It is said the loss sustained is not the consequence of that neglect; but the argument urged in support of that view appears to me to confound the injury with its cause. Here the embezzlement is the injury to be guarded against, not the cause of it. The embezzlement itself is the loss, not a separate cause of the loss. Then what led to the embezzlement, during this long period, but *Hasker's* neglect to prevent it, by acting weekly in the course of his duty? The proximate cause of the injury was certainly the absence of weekly inspection by this person; as, if he had done his duty, in one week the injury would have been stopped. The case of *Ionides v. The Universal Insurance Company* has been relied on to show that the loss here was too remote to be deemed to have arisen "by reason or in consequence of" the culpable

(q) 9 Exch., 341.

(r) 31 L. J. C. P., 105.

(s) 1 Smith's L. C., 185.

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neglect of *Hasker*. In that case, though it was assumed that the loss might or would have been prevented if the light on Cape Hatteras had not been extinguished; yet the proximate cause of the loss was not the removal of the light, but the accident that the master had lost his reckoning, and approached too near the shore in the darkness of the night. In the present case, one of the necessary effects of proper inspection would have been to stop the embezzlement; so that the absence of such inspection was the proximate cause of the embezzlement. Indeed, if this species of neglect of duty—and its effect—be not contemplated and covered by this policy, I am at a loss to know what advantage it would be to the bank. The duty of *Hasker* was to oversee a number of clerks in the performance of their duties, and with that object, among other things, vigilantly to inspect their accounts periodically; and one of the principal objects of this inspection was to prevent the very losses which here occurred. How, then, can it be denied that the loss was “by reason or in consequence of” his culpable neglect? His duties were continuous, and cannot be subdivided into portions of a week in duration; nor can it be properly held that each week’s duties followed upon, and therefore could not have produced as consequences, the injuries accruing in such successive week. We have been pressed to grant a rule *nisi*, as the case is one of importance; but as I feel no doubt on the point, I think it is much better to express our views at once, and refuse this application now, rather than, by granting a rule for further debate, give any sanction to the arguments which have been addressed to us.

BARRY, J.—I am of the same opinion. The question is, whether there was evidence to be sent to the jury or not. The words of the declaration are:— [His Honour quoted the words setting forth the material part of the policy quoted above.] What was the duty of *Hasker* here? To see to the performance of their duty by others. It was assumed that if he were not there, with such duties, these losses would occur. The object of his appointment, and the scope of his duty, was

to prevent such losses. He neglected his duties, and the losses arose by reason, or in consequence of such neglect. It is contended that the insurance policy only contemplates an active default or wrong-doing by *Hasker*, and not a mere omission of duty; but that is not the proper construction of these words—"wilful default or culpable neglect." Those words are indicative of want of performance as of active ill-performance. He, from his position and relation to those he had in charge, was to be responsible for the proper discharge of their duties by those under him. If this were not a neglect, the objection should rather have been to the reception of this evidence, as not applicable to the issue of neglect. [*Harris*.—It was so.] And the overruling of the objection was, in my opinion, quite proper. This case is very distinguishable from the case of *Ionides v. The Universal Insurance Company*. There the proximate fact which caused the loss was the captain's losing his reckoning, not the putting out of the light; it was almost, indeed, he said, that the proximate cause was an act of God that he arrived there by night, when he could not see the land. He relied on the light to correct the errors of his reckoning; the light was gone; he went on in the dark, and was wrecked. If he had come there by day he might have avoided the danger. The absence of the light was, as was observed in that case, rather the absence of an extrinsic saving cause than the presence of a proximate operating cause. The absence of the light was, therefore, too remotely connected with the loss to be deemed its proximate cause. But in this case, inasmuch as it must be assumed that losses will always occur in this way, if the inspection be not provided, or if through neglect of duty it be absent; in my opinion the proximate cause of this loss was *Hasker's* culpable neglect.

WILLIAMS, J., tacitly concurred.

Rule nisi for new trial refused.

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1864.
March 30.

REGINA v. BAILEY ET UXOR.

Where a wife and husband acted in concert for a theft, the wife taking and the husband receiving, and on their trial the wife was acquitted of the stealing, because of the presumption that she had acted under her husband's coercion, but yet the husband was convicted of the receiving from his wife:

Held, on a question reserved, that there was a stealing by the wife in fact, and that the presumption of law by which she was not here amenable to punishment did not alter that fact. Conviction affirmed.

Seemle, that where a wife steals goods at the instigation of her husband, he is himself guilty of stealing.

QUESTION of law reserved by a Judge at General Criminal Sessions in Melbourne, on the conviction of *Bailey* for receiving goods stolen by his wife.

Bailey and his wife were tried on an information, one count of which charged the wife with stealing a piece of silk in a shop, and the other the husband with receiving the silk so stolen. Under direction of the Judge, the jury acquitted the wife of the stealing, on the presumption that she was acting under the coercion of her husband; but they found the husband guilty of the receiving. The husband's counsel submitted that if there had been no stealing by the wife, there could be no receiving by the husband. The Judge respite execution, and stated the question for the opinion of the Court.

Sevell, for the Crown.

There was no appearance for the Defendant.

PER CURIAM.—There was a stealing in fact by the wife; and the presumption of law, in consequence of which a wife is not amenable to punishment for such a stealing, did not alter that fact. The husband who, with a guilty knowledge, received the goods so stolen, was guilty of receiving; and if the wife stole the goods at the instigation of her husband, he was himself guilty of stealing. The conviction therefore was right.

Conviction affirmed.

HARVEY, APPELLANT, v. RODDA, RESPONDENT.

1864.

March 30.

APPEAL from the Court of Mines, at Beechworth.

The parties were partners, first in auriferous quartz crushing operations, and then in a gold-mining claim. Coming into the Court of Mines on a partnership suit, that court decreed that accounts should be taken over the partnership as a whole, thus treating the partnership, as to its quartz crushing operations, as a "mining partnership" within the meaning of the Gold Fields' Act, and therefore a suit arising out of such a partnership as within the jurisdiction of the Court. The Appellants contested this view, and the jurisdiction.

The Court of Mines has jurisdiction over a suit concerning a quartz-crushing partnership, if such partnership were limited within a gold-field.

Wood and Harris for the Appellants.

Ogier for the Respondents.

The COURT, having regard to the definitions in the Act of the words "mine," "mining purposes," "gold," "mining partnership," and "gold-field," held quartz-crushing to be a mode of obtaining gold, and a partnership for that purpose to be a mining partnership, under the Act; and held that a suit arising out of such a partnership is a matter cognizable by the Court of Mines, provided such partnership was limited to a "gold field," as defined by the Act.

1864.

April 1.

Where Magistrates in Petty Sessions had wrongly convicted a person for illegally impounding horses, when he had but seized with intent to impound, and then abandoned his intention; but where the horses had been injured; the Supreme Court granted the Defendant a rule for prohibition, but refused him costs, on the Plaintiff undertaking to bring no action.

IN RE RAWLINGS, AND OTHERS, JUSTICES, AND
MOTHERWELL, EX PARTE MAHONEY.

RULE *nisi*, under the Act No. 159, to prohibit Magistrates in Petty Sessions at Preston, and the Complainant in a plaint there, of *Motherwell v. Mahony*, from further proceeding with a conviction of the Defendant for illegal impounding. *Mahoney* had seized sixteen horses of *Motherwell*, had put them in his yard, demanded trespass money, and said he would send the horses to the pound if the trespass-money were not paid. But the pound-keeper had refused to impound the horses, and thereupon *Mahoney* had let them go.

Fellows, for *Mahoney*, in support of prohibition, now contended that there had been no impounding at all—at most but a seizure with intent to impound, which intent was abandoned.

Wood showed cause against the rule *nisi* for prohibition.

The Court held on the evidence that there was a seizure only, and not an impounding; and that the conviction for an illegal impounding was wrong. They, therefore, made the rule absolute for prohibition; but, as the horses had been injured, they refused costs to *Mahoney*, if *Motherwell* would consent to bring no action.

This was consented to.

Rule absolute for prohibition, but without costs.

ROCHFORD v. JACKSON.

EJECTMENT by *James Rochford*, claiming as nephew and heir-at-law of *Charles Rochford*, deceased.

The trial was at the last sittings in Melbourne, before *Williams, J.* The Plaintiff had to prove the death of his father, and elder brother *John*. The Jury found specially that the death of the father was proved to their satisfaction, but that the death of the brother was not proved; and upon that finding the verdict was, by direction of the Judge, entered for the Defendant.

A rule *nisi* for a new trial was obtained on the ground that the finding of the Jury as to the death of the Plaintiff's elder brother was against evidence. The evidence that had gone to the Jury, as to the death of the Plaintiff's elder brother, proved that, though the Plaintiff and some other relatives or friends of the *Rochford* family had either been in the neighbourhood of their home in Ireland—*Knockbragh, County Clare*—or inquired after them there, yet the residence of these persons, or their inquiries, did not extend over the full period of seven years, from the time when the brother was last heard of at or near his home.

Sewell, Bunny, and M. A. M'Donnell for the Plaintiff.

Ireland, Q.C., Wood, and Fellows for the Defendant.

For the Plaintiff it was contended that if any persons not members of the family of the missing person, and even

case; *Stawell, C. J.*, dissenting, and holding that the presumption was one of law, which the jury *ought* to draw, if according to the rules of evidence they might draw it from the facts.

The seven years of absence, without being heard of, from which death may be presumed, may be proved in separate definite portions of time, by different competent witnesses.

1864.

April 2.

In ejectment by *James R.*, claiming as heir-at-law of his uncle; to prove the death of *John R.*, elder brother of *James*, such evidence was given of *John's* absence from his last residence during seven years, unheard of by those who would have heard of him if he were not dead, that a jury *might*, on that evidence, have presumed *John's* death: Held, by *Barry, J.*, and *Williams, J.*, that the jury were not on such evidence bound to presume *John's* death, but were at liberty to draw the inference of his death, or reject it, according to their conclusions on the whole

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strangers to him personally, but neighbours to him, living near his home, and having the means of knowing whether he were alive or dead, came forward and gave evidence that he left home more than seven years ago, and had not been heard of since in the neighbourhood, it was the duty of the jury to presume his death.

For the Defendant it was contended that the jury were not bound to draw such an inference from such evidence; that the absence of the available testimony of members of the family of the missing person, and the offering only of the evidence of other persons from his neighbourhood, was in itself a feature of the case from which the jury might draw counter inferences going to qualify, or even rebut, the direct effect of the testimony given.

The authorities cited were—*Balmer v. Exton* (t), *Norris v. Norris* (v), *Doe d. Lloyd and another v. Deakin* (w), *Doe d. France v. Andrews* (x), *Wyatt v. Bateman* (y), *Ex parte Taylor* (z), *Doe d. Knight v. Nepean* (a), *Thorne v. Rolff* (b), *Witham v. Derby* (c), *Tancred v. Christie* (d), *Oswald v. Lee* (e), *Rex v. Harborne* (f), *Doe d. Strode v. Seaton* (g), *Gibson v. Corcoran* (h), and 19 *Car. II.*, *Cap. vi.*

STAWELL, C. J.—From the peculiar circumstances of the case, I have had some hesitation in assenting to the discharge of this rule.

It appears to me that there was proof from which the jury might, according to the rules of evidence, have inferred the death,

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| (t) Carthew, 246. | (b) Dyer, 185 a. |
| (v) Finch, 419. | (c) 1 Wilson, 55. |
| (w) 4 B. & A., 433. | (d) 12 M. & W., 316. |
| (x) 15 Q. B., 756; S. C., | (e) 1 T. R., 270. |
| 23 L. J. Q. B., 760. | (f) 2 A. & E., 544. |
| (y) 7 C. & P., 568. | (g) 2 Cr. M. & R., 728. |
| (z) 7 C. B., 1. | (h) Sup. Ct. Vic., 25 May, 1854. |
| (a) 5 B. & Ad., 86. | |

and I think if that proof was not negatived, they *ought* to have so inferred. That this is the rule of law is in my opinion to be collected from some of the decisions to which we have been referred. The very terms of the leave reserved, and of the rule granted, in *Doe d. Andrews v. France*—"if there was evidence on which the jury *ought* to have acted," &c.—would imply it. The text-writers use the word "obligatory" in reference to the duties of jurors. The law has wisely determined that from certain premises a certain conclusion ought to be drawn. This rule has been adopted by the Legislature (*j*). To hold that it is optional with juries, if the premises are proved, whether or not they will draw the conclusion, would, it seems to me, fritter away the rule.

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It is contended, however, that the absence of certain evidence of a more conclusive character than that given, and which it is assumed might have been given, is of itself evidence to negative the presumption. I do not think so. At most, the not adducing such evidence would but justify a jury in inferring that the evidence, if adduced, would have been unfavorable to the party not calling it; and in so concluding, it must be inferred that the not calling such evidence is wilful, for otherwise the inference would be a mere suspicion, and one of a very low order. In the present case the very use, by the jury, of the words that "the death of the father was proved to their satisfaction, while that of the brother was not proved to their satisfaction," shows to me that they did not keep their minds on the point to which they should have been confined; that they looked for moral satisfaction rather than proof, merely, of facts sufficient to render it their duty to draw the proper inference on this presumption. It is suggested that, in the present case, because no one of the witnesses called is able to speak to the whole of the term of seven years of absence, that each is to be turned aside as an unqualified witness. I do not assent to that. If absence for

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the requisite number of years can be proved by different witnesses; if all speak definitely to a period, and all ought to have known of the missing person if he had not been absent, during the time as to which each witness definitely speaks, that is enough. If A can speak as to two years, B. as to the two succeeding years, and C. to the three years next following, that is just as sufficient as if A alone could speak to the whole seven years. It is indeed but rarely that you can get persons who can speak with personal knowledge as to the presence or absence of any person from his home continuously for a period of seven years. In the present case I certainly concur in the observation of my learned brother who tried the case, that the whole of the evidence of the Plaintiff, on this point, was left in a very loose way to go before the jury. But still I think there was evidence of one person or another, who, in the words of Mr. Justice Patteson, "would have heard of" the missing man "if he had returned." I think, also, there was evidence of inquiries in the proper localities, and of inability to discover him there. *Thomas* also went to Chatham to inquire after *John's* regiment, and ascertain there whether *John* was alive or dead. It is certainly not very clear whether the regiment was stationed there at that time. If it had been there, such inquiries would have been ample. Even if the regimental depôt only was there, he might have heard. In any aspect, it is evidence of inquiries made by persons acquainted with and interested in discovering whether *John Rochford* was alive or dead. Compare the whole evidence in this case—loose though it may have been—with the fragment which was given in the case of *Doe d. France v. Andrews*. What was the evidence there? That of one who had never seen the person in question, and who had never heard of him. There were no inquiries whatever. One person, who was a distant relation of the missing man, had not heard of him, and that was deemed enough to justify a new trial. On this ground alone, the Court made the rule absolute for a new trial, adopting the course, almost unprecedented, of making the costs costs in

the cause. Looking at that case, I think there was evidence here from which a jury ought to have presumed the death of the Plaintiff's brother. Personally, therefore, I think there should be a new trial. But the Judge who tried the case expresses himself as perfectly satisfied with the verdict. The rule is clear, that where the Judge who tries the case is dissatisfied with the verdict, it will not stand; but the converse of that rule by no means follows,—that a verdict will not be disturbed simply because the Judge before whom the cause was tried is satisfied with that verdict. Though, however, that is so, yet no doubt it is a very unusual course, and one which should not be taken in any but a very strong case indeed. The Judge who tries a case has many opportunities of noting important and significant features of it, which no other person possesses; and he assumes a great responsibility when he undertakes to state that he is satisfied or dissatisfied with a result on which he alone had the best means of forming an opinion; so that in any ordinary case I should even, if personally in favor of a new trial, say that such was my personal opinion; but in deference to the better opinion of my brother Judge who tried the case, I joined him in granting or refusing a new trial. This brings me to another point. If a new trial in an action of ejectment be granted, a jury can never be fairly told that the unsuccessful party is agitating a matter already settled. But if this verdict stands, and afterwards another action be brought, I cannot shut my eyes to the fact that if this verdict be proved to any future jury, it must be a very uphill case for the Plaintiff with that jury. So that refusing a new trial is to a great extent deciding the right to this property. I am therefore driven to the question whether this is such a case as that I should say a new trial should be granted in opposition to the opinion of the Judge who tried it. I cannot say that it is such a case. I do not think that I am justified in dissenting from the opinion of the Judge who tried the cause. In deference to that opinion, and from no other cause, I assent to the discharge of this rule.

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BARRY, J.—I have felt considerable difficulty in this case, from the looseness of the manner in which the Plaintiff's case was launched. But it has always been considered that the rule for a new trial in actions of ejectment stands on a totally different footing from the rule in ordinary actions, particularly when applied for by the Plaintiff. It is rarely made absolute when applied for by the Defendant. But notwithstanding that distinction, I feel very unwilling to disturb any case, when it has broken down from the insufficiency of the Plaintiff's own case. The action of ejectment does not settle the possessory title. Fresh actions may be brought again and again. Whatever may have been formerly propounded here—if anything have fallen from myself to the contrary—I am quite prepared to retract. Here the Plaintiff has failed to make out his case. As to the doctrine of presumptions, there have been some talked of in this case which I do not understand. There appear to me to have been but two which could be in question in this case. First, as *Rochford* was proved alive in 1854, it will be presumed he is still alive till the contrary is proved. The contrary may be proved by evidence of death, or by evidence of his absence from the place where he lived, and that he has not been heard of there by relatives or friends, or persons who would have heard of him there if he had returned; or by the evidence of such persons of his absence from the last place at which he was heard of, and of inquiries which proved inefficient. On proof of these things, which I take to be cumulatively necessary, the second presumption may arise; the jury in the presence of these proofs are justified in presuming that the absent person is dead. This second presumption being raised, it is incumbent on the opposite side not to raise a third presumption to the contrary, but to beat down the second presumption, and restore the first. Now, in this case my judgment is that the second was not established, and that the first therefore fell in full force. I concur that the evidence of presumption founded on absence for seven years may consist of the evidence of several persons, each speaking only to a portion of the whole seven years. But

conceding so much, I find a portion of the necessary time wholly unaccountable for by any witness. There is evidence relating to the time from 1854 to 1857, of the time from 1857 to 1860, and again of the year 1859. But there is a total want of evidence as to the period from 1860, or perhaps from some period in 1859, up to 1862. As to *Thomas Rochford* I cannot affirm that he had the means of knowing the facts on which the presumption could alone be founded. I think that the jury have exercised their undoubted privilege of attaching to the evidence before them the weight which they thought due to it. I am of opinion that the Plaintiff failed to make out the second presumption; that the first presumption, in favor of the duration of life till after 1860 of a young man shown to have been living in 1854, was not displaced; and that the rule for a new trial should be discharged.

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WILLIAMS, J. was of the same opinion as *Barry, J.* He thought the evidence given would have justified no other verdict than the one formed, and he was perfectly ready to take the responsibility of saying he was satisfied with the verdict. He thought the whole of the evidence before the jury formed materials on which they were to form their own conclusion as to the proof of the death of *John Rochford*; and he concurred with their conclusion as to the proof. The case was no exceptional one. The Plaintiff could come again when his evidence was more conclusive; but the present verdict was well sustained, and ought not to be disturbed.

Rule nisi discharged.

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April 2.

A ship-owner, who has by charter-party contracted to bring his ship "to Hobson's Bay, or as near thereto as the ship may safely get," and to deliver cargo "at any wharf where the ship can safely lie afloat," and who has brought his ship into the bay convenient to a wharf named by the charterer, may claim demurrage for any days during which he was ready to come alongside the wharf and discharge, but was kept waiting for a berth; and for any days during which, under stress of weather, he hauled out from the wharf to a distance, whence he could come alongside again as soon as the weather permitted.

YOUNG v. WOOLLEY AND ANOTHER.

ACTION for demurrage. The claim was for two delays. The verdict was entered for the Defendants, but leave was given to enter a verdict for the Plaintiff, for such sum not exceeding £96, as the Court should think proper. If both delays were allowed the verdict to be for £96, if one only the verdict to be for a less sum, if neither the verdict for the Defendants to stand. The charter party contained terms as follows: The barque "*Prince Arthur*" to proceed four trips to Newcastle, and there load with coals, and with the coals proceed "to Hobson's Bay, Victoria, or as near thereto as she may safely get, and deliver the same into any vessel, or, as customary, at any wharf where the ship can safely lie afloat as ordered by the charterers or their agents. . . . Twelve clear working days to be allowed the charterers of the ship, if the ship is not sooner despatched, for unloading, provided the ship can complete discharge within that time." The ship arrived in Melbourne, was directed by the agents to the old pier Sandridge, and was ready to take her berth there on the 27th November; but there was no berth then open for her. She was booked for a berth. She did not get her berth till the 1st of December; began to discharge on the 7th, and continued so to discharge till the 12th. Then there were four days during which the ship was driven by stress of weather in the bay to haul out from the pier. After that she returned to her berth, and finished her discharge.

The Plaintiff claimed demurrage, firstly, during the days during which he was off the pier, ready to take his berth, but with no berth open to him; and secondly, during the days during which he was obliged to haul out from the pier by stress of weather.

Wood and Harris, for the Defendants, shewed cause.

Dawson and Fellows for the rule.

The authorities referred to in support of the rule were *Hall v. Rawson* (*k*), *Brerston v. Chapman* (*l*), *Parker v. Winlow* (*m*), *Brown v. Johnson* (*n*), *Benson v. Blunt* (*o*), *Shadforth v. Cory* (*p*).

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Against the rule were cited *Kell v. Anderson* (*q*), *Barrett v. Duffon* (*r*), *Leer v. Yates* (*s*), *Kearon v. Pearson* (*t*), *Randel v. Lynch* (*v*), *Furnell v. Thomas* (*w*).

PER CURIAM.—The case is governed by the authorities as regards the first four days. The shipowner did his part. His inability to procure a berth was not attributable to any default on his part. If not provided for by the charter-party the loss should fall, not on the shipowner, but on the charterer. As regards the last four days the contract of the shipowner was to bring his ship alongside the wharf, and not take her away wrongfully. In this case he was compelled from stress of weather to haul out from the wharf, but the ship was still attached to it, and might have been brought alongside at any moment as soon as the weather permitted. This cannot be deemed a wrongful taking away. During the four days the Plaintiff's ship was so detained she was filled with the Defendant's goods, and unable consequently to be otherwise employed. For this detention the Plaintiff is entitled to be paid, unless he caused or contributed to this detention himself.

Rule absolute to enter verdict for Plaintiff. Damages, £96.

- (*k*) 4 C. B., N. S., 85.
- (*l*) 7 Bing, 559.
- (*m*) 7 Ell. & Bl., 942.
- (*n*) 10 M. & W., 831.
- (*o*) 1 Q. B., 870.
- (*p*) 32 L. J., Q. B., 379.

- (*q*) 10 M. & W., 498.
- (*r*) 4 Camp., 333.
- (*s*) 3 Taunt., 387.
- (*t*) 7 H. & N., 386.
- (*v*) 8 Camp., 352.
- (*w*) 5 Bing., 188.

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April 2.

B. and another, owners of pumping machinery on a golden quartz-reef, applied to a Warden, under the Act No. 153, to make a drainage assessment on each of the thirty-two claims on the reef. The Warden made his decision in each case, and signed a minute of each decision. On a separate sheet he made a further order, imposing "conditions" on the owners of the machinery. E. and others, owners of one of the thirty-two claims, appealed to the Court of Mines. They gave no notice of their appeal to the other claim-holders. On the appeal, the copy minute produced by the appellants, was that which was furnished to them under the Act No. 32, namely, a copy of the "decision" entered in each case, without the separate "conditions" imposed on the owners of the machinery. On questions stated by the Judge, under No. 32, sec. 70:

EARLY, APPELLANT, v. BARKER, RESPONDENT.

SPECIAL CASE reserved under the Gold-fields' Act No. 32, sec. 70, for the opinion of the Supreme Court by the Judge of the Court of Mines at Sandhurst.

The Respondents, *Barker* and another, owners of pumping machinery on the Johnson's Reef, applied to the Warden to assess the thirty-two claims on the reef, under the Drainage of Quartz Reefs Act No. 153. The Warden assessed every claim.

The Appellants, *Early* and others, owners of one only of the thirty-two claims assessed, appealed to the Court of Mines from the assessment. They served no notice of their appeal on the owners of the other claims.

At the hearing before the Court of Mines, the Appellants, *Early* and others, produced a copy, certified by the Warden himself, of the Warden's minute of his decision as follows:—

" Decision,

" Warden's Court, 16th January, 1864.

" *Matthew Barker and Julius Politz v. John Early, John Dowding, James Hoyle, and Henry Chapple.*

" I find that the claim occupied by *John Early, &c.*, the Defendants, " is drained by the pumping machinery of *Matthew Barker and Julius Politz*, the Complainants, and I do order that the said Defendants do

Held (1), that the objection as to the non-production of a copy of the minute of the "conditions" would be best met by allowing the appellants to correct the mistake, arising from the inadvertence of the Warden, and obtain and produce a proper copy of the full decision—adjourning the court, if necessary, for that purpose—on such terms as the Judge might think equitable. (2). That it was sufficient on the appeal, if the parties to the proceeding in the Warden's Court then appealed from, were persons, before the Court of Mines.

"pay to the said Complainants, by way of drainage rate, on Saturday, 16th January, 1864, the sum of £4 5s. 4d., and on each succeeding Saturday, (until the assessment is altered or annulled,) the sum of £1 1s. 4d. And I do further impose on the said complainants the conditions hereafter mentioned.

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" Signed,

" GRAHAM WEBSTER, Warden."

A similar minute was entered by the Warden in each of the thirty-two cases. It was admitted by both sides that the Warden had entered the "conditions" referred to in the minute, on a separate sheet, as follows :—

" Conditions,

" I do order that the drainors, *Matthew Barker* and *Julius Politz*, do continue to pump night and day, if necessary, at all times and seasons, in order to reduce the water; and shall endeavour to the best of their ability to drain the claims on the Johnson's line of reef.

" Signed,

" GRAHAM WEBSTER, Warden."

It was contended before the Court of Mines, for the Respondents, that the appeal must be dismissed for non-compliance with the Gold Fields Act (*x*), as the certified minute of the decision was incomplete without the "conditions" which the decision referred to. The Judge held that the Act required the Appellants only to produce the copy of such minute furnished to them under the 80th section; and that they had here done all they could.

First question reserved:—Whether the above ruling was correct?

The Act, after providing in the same section "that the minutes shall be entered in the book, and signed by the Warden" goes on to say that no formal order shall be necessary." The Judge concluded from this "that the minute is in itself the formal order," that if so, this minute was incomplete in omitting the "conditions," and that the Appellants were entitled to have the "conditions" inserted; but that the

(*x*) No. 32, Sec. 84.

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Court of Mines had no power to remit the minute to the Warden for alteration.

Second question reserved:—Whether the appeal ought to be allowed on that ground alone, without further proceeding in the matter; or whether the Court has power under the Act to admit evidence of the “conditions” under the Warden’s signature, and to vary or amend the decision by annexing these conditions accordingly?

It was objected for the Respondents that the appeal should not have been heard unless under the Act, the summons had been served seven days before returnable, on all parties interested in supporting the decision, or on such of them as appeared sufficiently to the judge to represent them, and that the other claimholders on the reef were so interested. “In practice, under the Drainage Act,” the case here proceeded, “the Warden first ascertains the gross sum to be allowed to the drainors, including interest on capital allowance for wear and tear of machinery, and weekly expenditure. He then apports this amount rateably, amongst the different claims on the line of reef. The Appellants in the present case objected that their claim was not drained by the Respondents’ machinery, and that they ought therefore to pay no assessment whatever. The Respondents then contended that the other claimholders were directly interested in this, as the effect of quashing the assessment on this claim would be to diminish the number of contributors, and throw the payment of Appellant’s share on the other claimholders. Thus supposing the gross amount to be £30, divisible amongst three claimholders only, A, B, and C, at £10 each; if A appealed, on the ground that his claim was not drained, and succeeded, the effect would be to throw the payment of the whole amount upon B and C. That the Warden had a quasi equitable jurisdiction under the Drainage Act, and this court must be governed by the same principles as a court of equity, as to parties, &c., and that the number of claimholders, or amount payable, did not affect

the principle involved. Further, that the court might, without quashing the assessment, alter and reduce the amount payable, and in that case the assessors would, in order to arrive at the "fair share" to be contributed by the Appellant's claim, have to inquire into and determine the amount to be contributed by the other claimholders. Also, on the other hand, it was contended that the interest of the other claimholders was too remote. And further that the Respondents might appear to the Judge sufficiently to represent all the parties interested. And further, that the decision of this court would have a mere temporary effect. That the Warden may at any time re-adjust or alter such orders from time to time, may annul, vary, or alter the assessment, imposing further sums or reducing the amount according to circumstances, so that should any party by appealing from the assessment, free himself from liability in respect thereof, he might still at the next readjustment be called upon to contribute, as a new state of things might have arisen.

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Third question reserved :—Whether the summons should have been served upon the other claimholders ?

In conclusion the Judge of the Court of Mines submitted to their Honors that this case was analagous to the case in equity, where no direct relief is sought against a party to a suit ; that to require that all the claimholders in every drainage case be formal parties to the appeal, would cause great inconvenience and expense ; and that in the present case there were thirty-two claims, each of which might be held by a partnership of many shareholders.

Fourth question reserved :—Whether it is necessary that all the claimholders should be made formal parties to the appeal, or whether it would not be sufficient to make the machine owners the sole parties respondent, and serve a copy of the summons on the several claimholders, so that they, or either of them, might come in and be made parties to the appeal, if so advised ?

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J. W. Stephen and Wrixon for the Appellants.

Wood and Webb for the Respondents.

The Court ordered its opinion on the case to be written as follows :—

“ The objection as to the non-production of a copy of the
“ minute of the Warden’s decision would be best met by allow-
“ ing the Appellants in such a case as the present to correct the
“ mistake, arising as it does from the inadvertence of the
“ Warden ; permitting a proper copy of the minute of the
“ decision to be produced, and if necessary adjourning the court
“ for that purpose, on such terms as the Judge may think
“ equitable.

“ As to the objection for want of parties, it is sufficient in
“ this case if the persons who were parties in the Court below
“ are before the Court of Mines.”

April 6.

A mortgage deed of mining plant and machinery does not require to be registered under the Act No. 109, sec. 28, where the mortgagee is in possession.

The word mortgage was intentionally omitted from the latter part of the Act, No. 109, sec. 28, respecting registration.

ORIENTAL BANK v. CARTER.

RULE *nisi* to enter a nonsuit. On the trial of an interpleader issue directed to try the ownership of mining plant and machinery mortgaged by a mining company, the point principally contested was whether a mortgage under the Mining Partnerships Act (*y*), requires to be registered where the mortgagee is in possession.

Michie, Q.C., Wood, and Fellows showed cause.

Billing and Dawson for the rule.

(*y*) No. 109, s. 28.

The Court held that there is an obvious distinction between mortgages and liens, the one implying, usually, possession by the lender, the other not usually so; that as both words, "mortgages" as well as "liens," had been used in the earlier part of the section, it must be assumed that the word "mortgages" was intentionally omitted from the latter part of the section respecting registration; that it might be more readily assumed that "mortgages" included "liens" than that "liens" included "mortgages;" and that the mortgage deed in this case, where the mortgagee had entered into possession, did not require to be registered.

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Rule nisi discharged, with costs.

HALFEY v. COLE.

March 24,
April 7.

TROVER for bags of salt, and for certain empty bags which had contained salt, but which after the Yarra Yarra floods no longer did so. The trial was before *Williams, J.*, in Melbourne, on the 4th and 5th March, and the verdict was for the Defendant.

At the trial of an action of trover for bags of salt, and also for certain empty salt bags, the Judge addressed counsel for Plaintiff, saying—
"I suppose the count in trover

Wood moved for a rule *nisi* for a new trial, on the ground of misdirection. The Judge had placed the Plaintiff's case before the Jury in a way which was erroneous in fact. He

is for the [empty] bags [only]." Counsel made no answer; but the Judge, by misapprehension, thought he was answered in the affirmative. The Judge then, assuming it to be correct that the count only covered the empty bags, directed the jury that as there was no evidence of conversion as to those bags, they must find for the Defendant. This was incorrect, for the count covered also the bags of salt claimed, as well as the empty salt bags. But the error was not corrected, and the jury found for the Defendant.

Held, that such mistake, and the direction founded on it, were not a misdirection in law; that it was the right and duty of counsel to interfere and correct such mistake; and that as counsel had not done so at the trial, when the mistake could have been readily corrected, a rule *nisi* for a new trial, on the ground of misdirection, granted to have the matter discussed and settled, should be discharged with costs.

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had told them that the count in trover concerned only certain empty bags out of which salt had been washed, and did not concern also certain other bags of uninjured salt which had been rescued, and delivered to third parties in full, instead of only in proportion to their share of the whole bulk saved; and then he had directed the jury that there was no evidence as to conversion as to the empty bags. But in point of fact the count in trover did concern the bags of salt, as well as the empty bags; and as to the bags of salt there was evidence of conversion.

WILLIAMS, J., stated that at the trial he pointedly asked counsel for the Plaintiff how the pleadings were shaped in this respect, and that accordingly as they answered, so he sent the case to the jury.

Wood, for himself and the other counsel engaged, assured the Court that no such answer as his Honor supposed had been given, and in corroboration he referred to the briefs of himself and his brother counsel, showing the points taken, and some calculations on which those points were founded. He then argued the point whether, supposing the Judge had misapprehended counsel, and supposing the erroneous way in which the case was sent to the jury arose entirely from the Judge's own misapprehension, it was the duty of counsel to interfere and correct the Judge's error at the time; or whether he had the same right to move for a new trial on such a mistake of fact, as in case of a misdirection in law.

STAWELL, C. J.—If I were called upon to pronounce immediately, I should be personally against the Plaintiff's view; but we think it better that the position of a Judge, with reference to questions of fact involved in his charge to the jury, should be clearly laid down. It seems to be assumed that he is bound to know all the details of every complicated state of facts in every case before him, and that a mistake as to any fact, or his omission to direct the jury in reference to

every possible aspect of the facts, is ground for a new trial. It is right that this question be discussed and set at rest.

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Rule nisi granted.

Ireland, Q. C., and Fellows, now shewed cause.

April 7.

Wood and Harris, for the rule.

The Court concluded that there had in this case been a misapprehension of Plaintiff's counsel by the Judge. Before his address to the jury he had said, addressing Plaintiff's counsel—"I suppose the count in trover is for the bags;" to which there was no reply; but under a misapprehension he thought counsel had given a negative answer. Under that misapprehension, in placing the case before the jury, he told them that there was no evidence of conversion of the empty bags, and that they should find a verdict on the trover count for the Defendant. The Court held that such a mistake as to facts, and the direction founded on it, were not a misdirection in law; that it was the right and duty of counsel to intervene and correct such a mistake and direction; and that as counsel had not done so at the trial, when the error might have been readily corrected, the rule should now be discharged (z).

Rule nisi discharged, with costs.

(z) *Payne v. Ibbotson*, 27 L. J., Ex. 341.

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April 6, 9.

The Registrar-General is not bound to issue a certificate of title to a purchaser from a Crown grantee, until the purchaser signs a receipt for the duplicate Crown grant.

Semble, per Barry, J.—It is the duty of the Supreme Court, which acts as the Exchequer Court of England does in matters of revenue, to protect the revenues of the Crown in this colony.

FITZGERALD v. ARCHER.

SUMMONS under the "*Real Property Act*" (a), obtained by *Fitzgerald* as the proprietor of land, calling on the Registrar-General to substantiate and uphold the grounds of his refusal to issue a certificate of title to the land, which had been selected by one *Coleman*, under the "*Land Act, 1862*" (b), and by him sold and transferred to *Fitzgerald*.

The facts appear on the Registrar's written statement of his grounds of refusal, as follows :—

" GROUND OF REFUSAL OF THE REGISTRAR-GENERAL TO ISSUE A
" CERTIFICATE OF TITLE TO JOHN FITZGERALD.

" The facts of the case :—

" On the 13th of July, 1863, a transfer from the Crown grantee, who lives at Geelong, in this colony, to *John Fitzgerald*, of Mininera, in Victoria, settler, was registered under the 99th section of the "*Real Property Act*," No. 140, such transfer being expressly subject to the obligations of the selector under the "*Land Act, 1862*," No. 145.

" The grant from the Crown was afterwards (viz : in October, 1863) registered, and a memo. made, both parts pursuant to the 30th and 43rd sections of the Act No. 140, thus—'Cancelled—See endorsement.' The endorsement gives the particulars required by the 36th section of the Act, No. 140, of the transfer to *Fitzgerald*.

" On the 27th November, 1863, Mr. *T. Hamlet Taylor*, describing himself as solicitor for *Fitzgerald*, requested a certificate of title to issue to the latter, and to be delivered to the former.

" On the 2nd of December, 1863, a letter was sent from the Registrar-General embodying the grounds hereinafter set forth, and requesting a formal requisition under the 107th section of the Act No. 140, signed by *Fitzgerald*, or by his duly constituted attorney.

" On the 9th of March, 1864, a letter purporting to be signed by *Fitzgerald*, wherein he describes himself as the registered proprietor, and headed thus :—'At Messrs. *Martyr, Taylor, & Buckland's*,

(a) No. 140, s. 107.

(b) No. 145.

"71, Chancery Lane, Melbourne, March, 1864,' was received, requesting
"the issue in his favor of a certificate of title, or that the grounds of
"refusal should be set forth.

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"The next day a letter was sent to *Fitzgerald*, addressed as above,
"intimating that it was in contemplation to proceed under the 11th
"section of the Act (No. 140) and requesting that he would send in
"another letter bearing the day of the date of his signature.

"On the 16th of March, 1864, a letter purporting to be signed by
"*Fitzgerald*, dated the previous day, and in other respects a copy of
"the letter of March, 1864, was received. Tracings of the signatures
"to both letters are annexed and signed by me.

"The grounds of refusal are these :—

"1. That a certificate of title will be issued when, and not before,
"a receipt for the duplicate grant is signed by the proprietor, which
"receipt is required under and for the purpose of the 24th section of
"the amending Act, No. 180.

"2. That neither the contribution to the assurance fund, under
"section 27 of the Act No. 140, nor the regulated fee for each grant
"under section 133 of the '*Land Act*, 1862' has been paid.

"3. That there is nothing in the Act No. 140 to exclude the rights
"of the Crown, or colony, to have such payments made.

"4. That it is against the general intention of the Act No. 140,
"shown by the 97th and 98th sections, and elsewhere, that a certifi-
"cate of title should be issued before an outstanding grant is given
"up.

"5. That the duplicate grant is required to be delivered up under
"the 43rd section, in order that it may be retained under section 44.

"6. That the crown grant is a material instrument within the 11th
"section (division 2) and the proprietor is required under the same
"section (division 1) to produce such grant as an instrument within
"his control, affecting the land, or the title thereto."

J. W. Stephen for the Registrar-General.

Fellows and *Holroyd* for the proprietor.

Cur. adv. vult.

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STAWELL, C. J.—The applicant was a purchaser from the Crown grantee, and had purchased before the Crown grant issued. He held merely the Treasury receipt for the purchase-money, and an instrument of transfer from the Crown grantee to himself. He relied principally on the 33rd, 34th, 43rd, 31st and 99th, sections of the act ; and contended that the first portion of the 99th section, taken with the other sections referred to, put him in the position of a “registered proprietor of an estate of freehold in possession of the land” within the meaning of the 33rd section, and that such “registered proprietor” was, under the 31st section, entitled to a “certificate of title” of his land without anything further. Unquestionably the first portion of the 99th, with the other sections, would in effect bear out that view, if other portions of the act and the remainder of section 99 did not qualify the parts thus relied on by the applicant, though it would be somewhat singular that a purchaser from a Crown grantee should in this respect be placed, as he certainly would be, in a better position than the Crown grantee himself. The 12th section appears to me to make the Crown grant itself the foundation of title, and the basis of the right to a certificate of title ; and this for the obvious reasons of ensuring proof of the conveyance of the land by the Crown, and an accurate description of parcels. The 99th section, too, expressly refers to the registration of the Crown grant. That necessarily implies the necessity for issuing the Crown grant. It then goes on, in the concluding part of the section, to require the Registrar-General “to enter thereon a memorial” of the dealing with the land then being transacted. Now, if the Treasury receipt alone is to be sufficient, what is the necessity for this enactment ? Though this act in a manner subverts the law of real property, yet land is not under it to be deemed as capable of being dealt with like a parcel of goods, and passed from hand to hand by the mere Treasury receipt alone ; and these enactments seem still to require some degree of accuracy in the description of the land itself and some formalities, though comparatively simpler and less expensive,

in dealing with it. I think, therefore, that the Registrar was right. In fact the question stands thus: a view of one part of section 99 taken with other clauses sustains the argument of the applicant; a view of the whole of section 99 taken with every part of the act supports the argument of the Registrar-General. In endeavouring to construe this measure, which appears to be somewhat ill-digested, it is our duty, as in all cases of construction, to look to the whole. There certainly does appear one inconsistency of detail resulting from the Registrar-General's view, namely, that it affects the first purchaser from the grantee only, and no subsequent purchaser; but, on the whole, I think the Registrar-General's construction was right, though I do not mean to say that the other view has not been supported by very cogent arguments indeed. The present application I regard as for a *mandamus* to the registrar to do his supposed duty. In such a case I should decline to interfere, unless I saw most distinctly that the applicant's title was a good one. The question mooted involves only the payment or non-payment of a fee of £1. I would not issue a *mandamus* to compel the Registrar-General contrary to his opinion to register a title which he may deem a bad one, and which I myself might afterwards, on the question coming before me in another form, hold to be imperfect.

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BARRY, J.—I am of the same opinion, though for reasons somewhat different. [His Honour read the preamble of the act, to show its general objects, and particularly to bring out the point that its aim is to reform and render more expeditious and simple the modes of transferring land as between subject and subject, not as between the Crown and its subjects.] The mode of conveyance by the Crown to the subject has always been simple, whether by grant, by matter of record, or otherwise. I presume, therefore, that as there was no necessity there was no endeavour by this act to change that. [His Honour read section 12, as to the mode of conveying land direct from the Crown by grant.] Turning, then,

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to the 99th section, we find a provisional arrangement made to facilitate the transfer of land before the formality of issuing the Crown grant has been completed; but that provision for a species of intercalary deed never for a moment contemplates that a Crown grant is not to be issued at all. [His Honour sketched the requirements of the act down to the point when, under the 99th section, the Registrar files in his office the Treasury receipt and instrument of transfer.] There the applicant proposes that the clause should end. He contends that with the rest of the clause he has no concern; that it regulates a mere departmental duty, the omission of which does not affect his right to a certificate of title. According to my view, we should continue the clause. It goes on—"and upon the registration of the grant of such land the Registrar-General shall enter thereon a memorial of such dealing, and," &c. Thus there is an express injunction, commenced by the copulative "and," coupled closely with preceding requirements in a manner that shows there is no distinction such as is contended for between the earlier and later parts of this clause. Those things being all done, and the purpose of taking the land out of the Crown being with due formality and with sufficient clearness of description once effected, and the certificate of title being issued, the title is launched in all its simplicity before the world. But I cannot concur that we are to dispense with the formal instrument which is to take the land out of the Crown. The Crown must in some sufficient manner signify its consent to that. But once issued to the grantee, or to the purchaser from him, the purpose of its issue is served, and it is returned to be cancelled, in order to show that the title has now gone out of the grantee. That this is the proper course is indeed to be deduced as well by analogy as from the express provisions I have cited, for each subsequent certificate of title granted to a purchaser is to be given up and cancelled as often as he becomes a vendor, and a new certificate granted to each new vendee. To my mind, the process resembles what occurs in the Encumbered Estates Court in Ireland, where there is on

each dealing with the land, a surrender of the title to the Crown, and a reissue of an unencumbered estate from the Crown direct. In this case, too, I deem it essential to go first to the fountain head for the origin of the title; and that till the Crown grant has issued, there is no satisfactory evidence on which to base a certificate of title having any effect in showing that the land has ever been severed from the possessions of the Crown. As I said before, the purview of the statute relates to transactions between subject and subject, and does not in the slightest degree alter the mode of conveying land from the Crown to the subject. I think a rule for a *mandamus* should not go. I think it right also to observe, that in this matter, one concerning the revenues of the Crown, this Court, which acts as the Exchequer Court of England does in matters of revenue, is bound to protect the revenues of the Crown in this colony. The Crown Land Sales Act directs that fees should be paid on the issue of a Crown grant. That which affects injuriously the *droits* of the Crown and the general revenues of the colony must be done by express words; and the view which the applicant enforces would diminish the revenues of the colony indirectly.

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WILLIAMS, J.—I quite concur in the opinion of the Court as to the necessity of the case being exceedingly clear before a summons under the Real Property Act would be allowed to go as prayed in this case. It is, no doubt, in the nature of a *mandamus*, calling on the Registrar to do an act, and a very important one, too. We should clearly see that the Registrar had neglected his duty. I also agree that the grounds on which the Registrar acted are very debateable, indeed. The bent of my opinion is that the Registrar was wrong: that there was no necessity for the grant issuing. The issue of the grant, and its cancellation, appear to me to be merely departmental and revenue arrangements. I see no necessity that the grant should issue to give a perfect title. By the 99th section, upon the receipt of the Treasurer for the purchase-money, together with a memorandum of transfer

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executed by the purchaser from the crown, the Registrar-General shall endorse upon the receipt the memorial required by the 36th section, and shall sign such endorsement, and stamp the same with his seal, and such transfer shall be held to be registered, and such receipt and transfer shall be filed in the office. Then the transferee is the registered proprietor, and, under the 31st section, is entitled to receive a certificate of title, and a duplicate original is to be bound up in the register book. Then under the 32nd section, such certificate is to be conclusive evidence of the title, and then the certificate is to be registered under the 33rd section, and deemed to be so when embodied in the register book. The 34th section points to the priority, according to the time of registration. It was said that the grant should be before the Registrar, when the certificate was demanded, and that the certificate was properly refused when the applicant declined to produce the Crown grant. But as I have before shown, I think a registered proprietor had the right to demand the certificate of title, which, when given, was conclusive evidence of his title, without any regard to the grant from the Crown. It is not necessary to say more on this head now, as the Court is unanimous that the summons should be dismissed, for the reasons first assigned.

Fellows, for the applicant, mentioned costs, suggesting that as the Court was not unanimous, they could scarcely expect the Applicant and the Registrar-General to be so.

STAWELL, C. J.—We cannot hold that the Registrar-General had “no probable ground” for his course?

Fellows.—I suppose it is another “*casus omissus*” as to the Crown grant; for, in point of fact, under the practice of the Crown, they will not give it up to us in the manner assumed

by the judgment of the Court to be their duty ; so it is impossible for us to produce it to the Registrar-General.

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BARRY, J.—The 12th clause is surely sufficiently ambiguous to give you an opportunity of testing its meaning, and the duty of the office.

Summons dismissed, with costs.

JENNINGS AND OTHERS v. KINSELLA AND OTHERS.

EJECTMENT for a "claim" within the meaning of the Gold Fields Act (c). The verdict was, by direction of the Judge, entered for the Defendants ; and leave was given to move to set aside the verdict, and enter it for the Plaintiffs. A rule *nisi* was obtained accordingly.

April 9.

The interest of the holder of a "miner's right" in his "claim" is at the utmost an estate at will, and for such an estate an action of ejectment cannot be maintained.

Billing showed cause.

McDermott and *Fellows* for the rule.

The question was whether an action of ejectment can be maintained in the Supreme Court for a "claim." This depended on the nature of the interest or right given by the Crown to a claimholder by his miner's right ; on the nature of the action of ejectment ; and on the nature of the jurisdiction given by the Gold Fields Act to the Warden's Court. Firstly, did the miner take under his "miner's right" more than the right given by a mere license, or, at best, more than a mere estate at will ? Secondly, could the interest taken under a miner's right, whatever that interest may be, support the demise which is the basis of ejectment ? Thirdly, did the

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Gold Fields Act (d) make the original jurisdiction of the Warden as to trespasses over, and disputed rights to, "claims," exclusive of any original jurisdiction in the Supreme Court.

As to the nature of the claimholder's interest, it was (in support of the rule) compared to the interest of a Cornish tin-bounder, after he has begun actual mining work in his tin-bound. The following cases were cited; *Doe d. Earl of Falmouth v. Alderson* (e), *Rogers v. Brenton* (f), *Couch v. Steele* (g).

THE COURT held that, whatever be the interest of the holder of a "miner's right" in his "claim," without pretending to define that interest, it is at the utmost an estate at will; and that for such an estate an action of ejectment cannot be maintained.

Rule nisi discharged with costs.

(d) No. 32, ss. 76, 77, &c.
(e) 1 M. & W., 210.

(f) 10 Q. B., 26.
(g) 3 E. & B., 402.

RENWICK v. McCULLOCH.

April 9.

E. sued *M.* **D**EMURRER to replication. Declaration for work and for the value of work and labor done by Plaintiff for Defendant in and about the labor done, in

the carriage and delivery of goods. *M.* pleaded that the work and labor was done by plaintiff "as a carrier by land for hire, within the Colony of Victoria;" and that plaintiff was not licensed "to carry on business as a carrier" under the Act No. 178. *E.* replied that the work was done under a special contract. On demurrer to the replication:

Held, that the Act No. 178 requires carriers generally to take out licenses, and is not limited to the class known to the common law as "common carriers;" and that though a "common carrier," who enters into a special contract for the carriage of goods, ceases to be a common carrier *quoad* such contract; yet a carrier, within the meaning of the Act No. 178, may enter into a special contract for carriage, and still continue a carrier *quoad*, the subject matter of that contract; therefore, judgment for the Defendant.

carriage and delivery of goods by the Plaintiff for the Defendant, and in and about the providing of horses, men and materials for such delivery and carriage at the request of Defendant; and for money had and received, &c.; and money found due on account stated.

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Pleas,—For a further plea to the declaration, except so much as alleges Defendant indebted to Plaintiff for money had and received, &c. “That the work and labor in the declaration mentioned, and therein alleged to have been done by the Plaintiff for the Defendant, were and are work and labor done by the Plaintiff as a carrier by land for hire within the colony of Victoria, and that the said accounts in the declaration mentioned, and therein alleged to have been stated between the Plaintiff and Defendant, were and are stated of and concerning such work and labor. And that the Plaintiff had not at the time of his doing the said work and labor a license authorizing him, nor was he duly licensed to carry on business as a carrier, according to the Act of the Parliament of Victoria in that behalf.” Verification.

Replication.—Further replication to the last plea. “That the said work and labor was done by the Plaintiff at his request under and by virtue of a special contract in writing signed by the Defendant, and that the said accounts were stated between Plaintiff and Defendant in respect of such work and labor.” Verification.

Demurrer to last replication,—“Because the 8th section of the Act of the Parliament of Victoria does not render it unnecessary for a common carrier who enters into a special contract to have a carrier's license.”

Plaintiff's points :

1. It does not appear in and by the last plea that the work and labor therein mentioned “was done after a period of more

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than three months had elapsed from the passing of the said Act of Parliament of Victoria, numbered seventy-eight."

2. Nothing in the Act "prevents or prohibits any person who has not obtained a license under the said act as a common carrier from suing, in respect of work and labor done by him, as a common carrier; or upon an account stated in respect of such work and labor."

3. The provisions of the Act "do not extend to or include work and labor done under a special contract in writing; or an account stated in respect of said work and labor."

Wood for the demurrer and Defendant's pleadings.

Fellows for the Plaintiff's pleadings.

STAWELL, C. J.—I am of opinion that the Act (No. 178) requires carriers generally to take out licenses, and is not limited to the class known to the common-law as "common carriers." It extends to a class of persons described in the enactment as those who carry on the business of "a carrier by land for hire." The preamble contains two recitals, one of them referring to "common carriers," and the other to a class not generally known in Great Britain, but well known here, of persons who make a living by carrying for hire to any place wheresoever. The object of the Act is two-fold—to limit the liability of "common carriers," and protect the public from the frauds of carriers generally. The two classes seem distinctly in view of the Legislature. In fact, so far as the licensing provisions are concerned, the public are much safer with "common carriers" than with the other class. They are known; they travel between known *termini*, and are always to be found; whereas the other class of carriers and forwarding agents, after receiving goods, in many instances are not so easily discovered. The schedule is certainly opposed to this view, but I observe that section 11 uses the words "may be."

The construction of the whole act is not therefore to be limited by it.

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A common carrier who enters into a special contract for the carriage of goods ceases to be a common carrier *quoad* that contract. Were the Act limited, as the Plaintiff contends, the replication would form a sufficient answer to the plea, as the subject matter of the action must be illegal, in order to prevent the Plaintiff recovering; but if the Act is, as I think it ought, to receive the larger construction, a person who trades as a carrier may enter into a special contract for carriage, and yet still continue a carrier *quoad* the subject-matter of that contract. The replication would in that case not answer the plea.

Judgment for the Defendant.

JAMES AND OTHERS (Great Extended Company), APPELLANTS, v. HIGGANS AND OTHERS (Koh-i-noor Company), RESPONDENTS.

May 2, 13.

APPEALS stated by the parties under the Gold Fields' Act from two decisions of the Judge of the Court of Mines at Ballarat.

The Judge of the Court of Mines has no jurisdiction to hear and decide, out of the territorial limits of his Court, a motion to grant an injunction in a matter otherwise within the jurisdiction of the Court.

In January of this year the present Respondents, *Higgans* and others (Koh-i-noor Company), began a suit in the Court of Mines, at Ballarat, against *Forbes* and others (Band of Hope

suit in the Court of Mines the Plaintiffs obtained an injunction from the Deputy-Judge, outside of his territorial limits. The Plaintiffs then moved, before the Court of Mines, to vary the injunction; and the Defendants to dissolve it. The Court refused the motion to dissolve; and did not grant the motion to vary; but of its own motion made a fresh injunction substantially similar to that granted by the Deputy-Judge. On appeal from both decisions,

Held, that the injunction granted by the Deputy-Judge should have been dissolved; and that the injunction granted by the Court was not warranted by the proceedings on materials before it; and both decisions reversed with costs.

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Company), together with the present Appellants, *James* and others (Great Extended Company), praying a decree that the Band of Hope Company should specifically perform, and the Great Extended Company concur in the performance of, an agreement between the Koh-i-noor and Band of Hope, dated 14th October, 1861, to end a dispute then pending between them "as to the right of possession of a certain piece of ground on the Golden Point Lead" (*h*). An injunction was prayed to restrain both Defendants from interfering with the land mentioned in the agreement. On the 23rd January an injunction was, on an *ex parte* application, obtained by the Plaintiffs from the then Deputy-Judge of the Court of Mines. On the 25th February, the Plaintiffs served notice of a motion to vary the injunction by the insertion of directions for prosecution of mining-work under the management of the Court. On the 4th March, the Defendants now appealing (Great Extended) gave notice of a motion to dissolve the injunction, on the ground that the order for it was made by the Deputy-Judge in Melbourne, out of the jurisdiction of the Court of Mines. These motions were heard before the Court of Mines. The Court refused the motion to dissolve; and did not grant the motion to vary; but of its own motion went on to grant a fresh order for an injunction substantially similar to that granted by the Deputy-Judge. From both these decisions came the present appeals: the appeal from the first, on the ground that the proceedings and materials before the Court did not warrant the order made; the appeal from the second, on the ground that the decision was wrong. Both appeals were argued in the extended Term, and judgment reserved. The parties assented to a proposal made by the Court, that judgment might be delivered in the Equity Appeal Sittings following the Term, and the judgment of the Court was now delivered accordingly.

May 13.

STAWELL, C. J.—In this case both appeals may be considered together. That relating to the motion to dissolve the injunc-

(*h*) See the agreement, *Ante*, Vol. I., Law, 260.

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tion was argued as if the application for the injunction order were heard within the jurisdiction, and merely the signature of the Judge obtained in Melbourne; but we think, on a perusal of the case, as agreed to by both parties, that it must be taken to mean that the hearing of the application, as well as the judicial decision and the signing of the order, took place in Melbourne. The objection taken below is shewn to have been that the order was signed in Melbourne on an *ex parte* application, from which the inference would be, that the application was also in Melbourne. The ground of appeal stated is, "that the said order was made," &c. beyond the bounds, &c. It would appear, therefore, that there was no waiver—no consent that the application should be deemed to have been heard, or the decision pronounced, in a different place from where the order was signed. We think that the application was made and the decision pronounced outside the territorial limits of the Court of Mines. If so, considering the carefully limited jurisdiction conferred on that Court, in express terms, we think that it is unnecessary to resort to any arguments from inconvenience. One case—that of *Reg. v. The Inhabitants of Totness (j)*—does seem to authorize the performance of a merely ministerial duty by justices outside the districts in which they have jurisdiction; but the same case is perfectly decisive that every judicial act must be performed within the jurisdiction. We think, therefore, that the order was bad, and that the motion to dissolve it should have succeeded. This appeal must therefore be allowed.

The second appeal to some extent depends on the first. The application was made to the Court of Mines to discharge the injunction on the grounds now urged. The Judge was of opinion that his Deputy-Judge had sufficient jurisdiction, and discharged the application. But at the same time he granted the same injunction over again. Such a course, as it seems to us, was scarcely regular. Rules are sometimes moulded by

(j) 11 Q. B., 80.

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the Court; but when one party gives notice to another of a distinct application like this; to make an order of this character not asked for by the party in whose favor it is made, is, to say the least of it, without precedent. We feel bound, therefore, to allow this appeal also.

Upon the question of costs, considering the nature of the objections, we were at first not disposed to grant costs; but on further deliberation, we see that the parties affected by these orders have a right to come here for redress against them, and there is nothing on their part to disentitle them to the usual result of success in such a case. We therefore think the Appellants entitled to costs in both cases.

Appeal in each case allowed, with costs

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Victoria,

AT LAW.

IN

TRINITY TERM, 28 VICTORIÆ.

The Judges who sat in Banc in this term were—

STAWELL, C. J.

WILLIAMS, J.

BABBY, J.

CLOUGH AND ANOTHER v. HOPKINS AND ANOTHER.

SAME v. BYRNES AND ANOTHER.

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June 22.

DEMURRERS to pleas in two actions against the *Hobart Town and Launceston Insurance Company* and the *Pacific Fire and Marine Insurance Company* respectively, on policies of insurance over the hull and furniture of the ship "*Eli Whitney*."

A marine policy on the "*Eli Whitney*" contained the following clause:—
"Claims for losses or average to be payable by the Company at three months after settlement of the same." The insured

Each policy contained the following clause:—

"Claims for losses or average to be payable by the Company at three months after settlement of the same."

brought their action. The declaration averred *inter alia* "That all conditions had been fulfilled, and all things happened to enable the Plaintiffs to be paid." Plea, "That three months after settlement of the claim of the Plaintiffs for the said alleged loss had not elapsed before suit." On demurrer to the plea,

Held, that it was bad for not stating affirmatively the settlement, or facts dispensing with the settlement; and judgment for Plaintiffs.

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The demurrer in *Clough v. Hopkins* was first argued. In this case the declaration stated the issue of the writ on the 23rd February, 1864; averred a total loss on the voyage during the continuance of the risk, and that "all conditions" had been fulfilled, and all things happened, to enable the "Plaintiffs to be paid;" and alleged breaches of the contract, in that the Defendants did not settle the claim of the Plaintiffs for the loss, and had not paid.

The sixth plea was as follows:—"That three months after settlement of the claim of the Plaintiffs for the said alleged loss had not elapsed before suit."

Demurrer to sixth plea on the ground:—"That three months' credit is allowed only where a liability is admitted, and settlement or adjustment has taken place, and not where the Defendants deny any liability at all."

Defendants' written point for argument was that:—"The Plaintiffs' right to payment of the moneys sued for had not accrued under the policy at the time of action brought."

Fellows for the demurrer and declaration.—Looking to this clause in the policy, if this plea be right, it follows that the Defendants have only got to refuse ever to settle to escape payment altogether. But the meaning of settlement here is adjustment between the underwriters. *Arnold on Insurance* (k). By general usage of the trade among the underwriters, they do not pay until a month or six weeks after the broker has adjusted the losses between them. In this policy the same thing is pointed at by the word "settlement"—an adjustment between the underwriters—and then, instead of it being left to the custom of the trade, the parties agree that there shall be three months' credit. But, in fact, here, where there is but

(k) Vol. II., p. 1199, 2nd ed.

one underwriter, there is no occasion for settlement, and the three months run therefore from the time the liability is admitted. And where the liability is denied there is no credit at all, but the insured may sue at once. If it were not so there would be no getting over such a plea as this, for the insurers have only to refuse for ever to settle, and then the three months after settlement can never run, and the time for their paying never come at all. The plea does not distinctly allege an adjustment, so that we could traverse it. In fact, it could not, for none could take place where there is only one underwriter. On the other hand, it does not deny adjustment, which it ought to do if adjustment be essential for their defence.

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Harris for the plea.—The Plaintiffs have themselves alleged a settlement in those words of the declaration that “all conditions have happened, &c.” It is an essential averment in the declaration. Under the old rules the Plaintiffs must have averred it specifically. Now they may aver it generally, under the words “all conditions have been fulfilled, all things happened, and all times elapsed, to entitle the Plaintiff to be paid.” They, therefore, allege the settlement. Then, we confess that, and avoid it by saying that the three months have not elapsed since such settlement. They are in no worse position whether the claim is disputed or admitted, because they can in the one instance allege that the three months have elapsed since the settlement, and in the other that the three months have elapsed since when the settlement should have been made. *Strong v. Harvey* (1) is entirely in point. There was a clause in the policy “In case of loss or average, the same shall be paid within two months from adjustment.” The declaration there alleges a requirement to adjust, and a refusal to do so within a reasonable time, and the lapse of the two months after that. The declaration should have done so here. Or if it be deemed to have done so here, under the general

(1) 3 Bing., 314.

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avermment of "all conditions performed," &c., then we have traversed it by our plea. *Mussen v. Price* (m). —[*Stawell*, C. J.—Does not the clause mean that you have three months' credit only where the claim is not disputed, and adjustment is necessary? In England, the adjustment being made, the insurance broker gives his acceptance instead of cash, and that very acceptance admits the claim; but he would not get the credit, nor of course give any acceptance, if the claim were disputed by his clients, the underwriters. Then, as to adjustment, it is hardly a proper word in a case of total loss. Adjustment refers to cases where there is an average to be adjusted. They say you get credit only after settlement; you say you may contest the claim, and have three months' time to think about it, in all events.—*Barry*, J.—You contend that your agreement is—we will pay you three months after adjustment, whether we adjust or not. Does not their declaration amount to an averment that they were ready and willing to adjust, if called on to do so?]—If so, then we have gone on and said that the three months have not elapsed. If not so, then their declaration is insufficient. Otherwise, why was the allegation set forth in *Strong v. Harvey*? This clause is an express agreement for three months' credit in any event—after settlement, if settlement made; and after the time when settlement should have been made, if settlement not made. From the very day he says settle this claim our three months run. *Roper v. Lendon* (n).

Fellows in reply.—*Scott v. Avery* (o) shows the distinction between this case and *Strong v. Harvey*, namely, that a third person had to decide: just as in the case of a surveyor's certificate.

THE COURT wished to hear the case of *Clough v. Byrne* argued.

(m) 4 East., 147.

(n) Ell. & Ell., 825.

(o) 8 Ex., 478; In error, 8 Ex., 497; In *Dom. Proc.*, 5 H. L. Cas., 811.

In this case the declaration, a fifth plea, and a demurrer to such plea, were formally identical with the declaration, sixth plea, and demurrer in the preceding case.

Fellows, for this demurrer, had nothing to add to his argument in the preceding case.

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Dawson (*Wood* with him) for the plea.—The argument on the other side obliterates this clause in the policy altogether. According to them, they would declare exactly the same if this clause did not exist. No doubt, *prima facie*, the right to sue us occurs as soon as the loss has happened. But to meet that very case, and by analogy to the credit for one month given by custom of the trade in London, this clause is inserted to give us credit for three months. Is not that the obvious meaning? If so, is not the lapse of three months a condition precedent to their right to sue? As to the difficulty about the right not accruing till after a settlement, and our refusing to settle, there is nothing in that; because if we ought to settle and do not, then our three months begin when we ought to settle and refuse to do so. *Tredwen v. Holman* (*p*) shews that we could be sued for not settling. [*Stawell*, C. J.—What is the meaning of settling there but adjustment? What adjustment can there be where there is nothing to adjust as between the Defendants and the insured?—There are other things comprehended besides that in the term.—[*Stawell*, C. J.—But those are between other underwriters and the insurers, with which the insured have nothing to do. *Williams*, J.—How can you take advantage of your own wrong in refusing to settle?—We do not do so. We do not refuse to settle. On the contrary, we admit that a settlement has been made, and then we go on and say that the three months after settlement have not elapsed.—[*Williams*, J.—You say you admit what they say they have not averred. *Stawell*, C. J.—It appears to me that you do not distinctly admit, or aver, any settlement.

(*p*) 1 Hurl. & Colt., 78.

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 v.
 BYRNES.

In fact, you have never admitted or denied it. If it were essential for them to aver the settlement, you should distinctly admit it or deny it. If you mean to avoid it, you should first distinctly plead it.]—On a plea of no notice of dishonor, you admit the dishonor. So here, by pleading that the three months had not elapsed after the settlement, we admit the settlement. If they could have traversed that on our plea, they should have averred it as a breach in their declaration; and in the declaration in the other case they actually did so. As to conditions, see *Viner's Ab.*, title "Condition"; *Wentworth v. Wentworth* (q), *Hotham v. East India Company* (r).

Fellows, in reply, referred to a *dictum* of *Bramwell*, B., in *Tredwen v. Holman*, as in his favor.

STAWELL, C. J.—We think the plea bad for not stating affirmatively the settlement, or facts dispensing with it.

Judgment for the Plaintiffs.

q) *Styles*, 242.

(r) 6 T. R., 710.

LINDSAY, APPELLANT, v. TULLAROOPE DISTRICT ROAD BOARD AND RATEPAYERS, RESPONDENTS.

1864.
June 22.

APPEAL case stated under the Act No. 159 by the Police Magistrate in Petty Session at Maryborough.

Lindsay was summoned by the Board under the "*Local Government Act*" (s) for general rates. At the hearing, the books of the rates of the Board were produced as evidence. It was proposed on behalf of *Lindsay* to shew by cross-examination that the rate itself was invalid through non-compliance with the requirements of sections 186, 187, and 188. It was also proposed to give substantive evidence of these points. The magistrates overruled the questions, put with this object on cross-examination, and rejected the evidence offered, on the ground that the rate books were conclusive proof of the validity of the rate.

The *T. Road Board* sued *L.* in Petty Sessions for rates, and offered the rate books as conclusive evidence that the rate was a valid one. *L.* offered evidence to shew that the rate was invalid. The magistrates held, under No. 176, sec. 206, that the rate-book was conclusive evidence.

From this decision, among others at the same hearing, came the present appeal.

Held, that the magistrates were wrong, and their decision reversed; but no costs given against the Road Board as a public body.

Fellows for the Appellant.—The question is, whether we are not at liberty to shew that there has been no compliance with the requirements of the Act No. 176, secs. 186, 187, &c., as to the making of the rate. These requirements are conditions precedent to the validity of the rate. If so, we may shew non-compliance with them, unless the law takes away our right to do so. The Respondents rely on section 206, as making the production of the rate-book conclusive of the rate; but that is clearly a wrong view, for the Act only makes the rate-book *prima facie* evidence; it only dispenses with proof by the other side, in launching their case at the outset, that the requirements of the Act have

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 LINDSAY
 v.
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 DISTRICT
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been complied with. *Mayor of Salford v. Ackers (t)*, *Woods v. Reed (v)*, *Rex v. Newcomb (w)*.

No appearance for the Respondents.

STAWELL, C. J.—There can be no doubt that the Act only makes the rate-book *prima facie* evidence. The decision must be reversed, and the parties begin again *de novo*.

Fellows asked for costs.

THE COURT declined to give costs against a public body in the present case.

*Decision of the magistrates reversed,
 without costs.*

(t) 16 M. & W., 85.

(v) 2 M. & W., 700.

(w) 4 T. R., 368.

CROWL v. FLYNN.

June 24.

Where under the Act, 16 Vic., No. 26, sec. 20, only one original registration form of a marriage had been filled up instead of duplicate originals, and only a copy of the original was registered, instead of a duplicate original.

Held, that under the Act No. 70, sec. 17, the irregularly registered copy of the original, and a copy of that copy, were sufficient proof of the marriage.

REPLEVIN. It was necessary to prove a marriage. For this purpose, the original registry of the marriage, and also a copy of the same registry were given in evidence. But it appeared on the face of the original that the whole of it—the entries, the signatures of the husband, wife, priest, and witnesses—and all, were in one handwriting; that but one original instead of duplicate originals had been made; and that a copy of the single original, instead of one of the duplicate originals, had been registered; so that the

registry, and copy of it produced, instead of being one an original document and the other a copy of an original document, were one a copy of an original and the other a copy of the copy (x).

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CROWL
v.
FLYNN.

The verdict was for the Plaintiff.

Ireland, Q. C., moved, on leave reserved, for a rule *nisi* to enter the verdict for the Defendant, on the ground that the marriage had not been duly proved.

Sewell, as *am. cur.*, handed up the cases *Doe d. France v. Andrew* (y), and *Doe d. Bassett v. Mew* (z).

THE COURT held that the documents, though irregularly registered, were made evidence by law—both the registration and the copy of it; and that to hold otherwise would be to make innocent parties suffer for the irregularities, some of them involving penal consequences, of persons over whom they had no control.

Rule nisi refused.

(x) 16 *Vic.*, No. 26, sec. 20;
No. 70, sec. 17.

(y) 15 Q.B., 759, *per Erle*, C.J.
(z) 7 A. & E., 240.

1864.

June 27.

FENTON, APPELLANT, v. DRY, RESPONDENT.

The Act 11 Vic., No. 33, sec. 13, enacts by reference the provisions of the Act 5 Will. 4, No. 22, relating to the recovery of forfeitures and payments for offences under the referring enactment; and the repeal of the 5 Will. 4, No. 22, by the Act No. 159 left the provisions incorporated from the Act referred to in full force as if they had been enacted in full in the referring Act.

APPEAL case stated under the Act No. 159, by Magistrates in Petty Sessions at Maryborough.

Richard Dry was charged by information, for that, in January last, at Maryborough, he did "for, or in expectation of fee gain and reward, draw or prepare a certain deed of conveyance of real estate between *Samuel Spooner* and *Matthew Adamson*, he not being legally qualified thereto according to law."

At the hearing, it was contended for *Dry* that the Act 11 Vic., No. 33, sec. 13, under which the information was laid, enacted that penalties might be recovered under that section in accordance with the provisions of the Act 5, Will. 4, No. 22; but that the latter Act was repealed by the Act No. 159, and the remedy under it thereby destroyed.

The magistrate held that the objection was fatal, and dismissed the information, stating his determination thus:—"But I being of opinion that the 11 Vic., No. 33, sec. 13, requiring the prosecution to be in accordance with 5 Will. 4, No. 22, which by No. 159 is repealed, held that "I had no jurisdiction in the matter. The question for the opinion of this Court is, whether the said determination was correct in point of law, and what should be done in the premises."

F. L. Smyth for the Appellant.

No appearance for the Respondent.

Fellows, as *am. cur.*, referred to *Reg. v. Stock (a)*.

(a) 8 A. & E., 405.

STAWELL, C. J.—In this instance the proceedings have been taken by information for a breach of the Colonial Act 11 *Vic.*, No. 33, sec. 13, which directs that the penalties under it shall be sued for and recovered in a summary way before any two Justices of the Peace, “and in accordance with the provisions” of the Act 5 *Will.* 4, No. 22. The reference to that Act, 5 *Will.* 4, No. 22, in the Act 11 *Vic.*, No. 33, had the same effect as if every clause of the 5 *Will.* 4, No. 22, had been set out *in hæc verba* in the referring Act, instead of being merely referred to by it. This mode of adopting other legislative provisions into Acts by mere reference to the provisions adopted, is certainly not the most convenient mode of legislation, though it may appear a compendious one. The most convenient way would in all instances be, notwithstanding the repetition, to enact the provisions thought desirable. In this case it was done by a mere reference to the provisions enacted as to be found in the Act referred to. Then the later Act, No. 159, repeals the Act referred to generally; and on proceedings being taken under the 11 *Vic.*, No. 33, in a summary way, in accordance with the Act 5 *Will.* 4, No. 22, so repealed, it was supposed that such repeal effected also a repeal of the provisions of that Act which had been incorporated by reference in the Act 11 *Vic.*, No. 33. This was a misapprehension. For the purposes of the referring Act, the provisions incorporated from the Act referred to still exist in full force, just as if they had originally been enacted in full in the referring Act. The decision must be reversed. The appeal will be allowed with costs, and the case remitted back to the magistrate with the opinion of the Court.

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FENTON
v.
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BARRY, J.—The mode of legislation by reference from the enacting measure to other Acts may present conveniences in some respects, but it leads to the very greatest inconveniences in others—more particularly in cases of English Acts not commonly accessible in this country. Large portions of English Acts have, in some instances,

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v.
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been thus incorporated into our Acts by mere reference, thus many persons are bound here by an immense mass of legislation of which they have no knowledge whatever, except by the purchase of English Acts—not readily accessible here. In the present case, there has, however, been a misapprehension of the consequences of repealing, generally, substantive enactments which have been so adopted by reference. If the repeal of a substantive enactment caused always the repeal of the same provisions in every incorporating Act, it would follow that the repeal of English Acts might emasculate a great portion of the legislation of this country.

Appeal allowed, with costs.

WILKIE AND OTHERS v. HUNT AND ANOTHER.

June 29.

H & O., of Ballarat, ordered of W., W. & Co. in Melbourne, iron pipes to be delivered by the Railway at Ballarat. W., W. & Co. forwarded pipes by train, but H. & O.

AN action for £57 16s., the price of iron pipes sold and delivered and bargained and sold. Defence, as to the sale and delivery, that the pipes were not accepted; and as to the bargain and sale, that there was not a sufficient memorandum in writing of the contract.

The following correspondence by letters and telegram was proved at the trial.

deeming them not according to the weight left the pipes lying at the station to the order of W., W. & Co. The correspondence did not either expressly or by reference identify any particular pipes. In an action for goods sold and delivered, and goods bargained and sold, W., W. & Co. recovered the price of the pipes. On rule for a nonsuit,

Held, that there had been no acceptance to complete a sale and delivery; that extrinsic evidence to identify any particular pipes as those bargained and sold under the correspondence could not be given; and that as the correspondence alone did not identify any particular pipes it did not constitute a memorandum in writing of the contract sufficient within the Statute of Frauds.

" 32 King-street,
" 4th March, 1864.

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v.
HUNT.

" Messrs. *Hunt & Opie*, Ballarat.

" Gentlemen,

" Referring to our conversation of yesterday, we will supply you with the quantity of 10½ pipes you require at 14s. per cwt. net cash, or at 14s. 6d. per cwt. by acceptance at three months; delivered at the station.

" Yours, &c.,
" WILKIE, WELSH & Co."

" Ballarat,
" 15th March, 1864.

" Messrs. *Wilkie, Welsh & Co.*

" Be pleased to forward us nine lengths of the 10½ pipes by early train, at 14s. per cwt., and we will forward you our cheque for the amount on receipt.

" Yours, &c.
" HUNT & OPIE."

" 16th March, 1864.

" Messrs. *Hunt & Opie*.

" In answer to your note of yesterday, when you made inquiries as to the supply of the pipes, you particularly requested to have it by return of post. We having done so, also expected to have your answer of acceptance by the same time, or within a reasonable time. But more than a week having elapsed, we cancelled our offer, and, acting upon advices from England, we cannot offer our pumps under £16 per ton, at which price we are ready to deliver.

" Yours, &c.,
" WILKIE, WELSH & Co."

" 19th March, 1864.

" To Messrs. *Wilkie, Welsh & Co.*

" We are in receipt of yours of the 16th. Be pleased to forward the pipes by first train, at £16 per ton, forwarding invoice in due course.

" HUNT & OPIE."

" 22nd March, 1864.

" To Messrs. *Hunt & Opie*.

" In answer to your note, 19th instant, we have, yesterday, forwarded to Victorian Railway the nine pipes you have purchased; invoice—an average of 8 cwt. 0 qr. 3 lb., which we hope you will safely receive. We will remark that the price is understood to be net cash amount of invoice, £57 16s.

" WILKIE, WELSH & Co."

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" 24th March, 1864.

" To Messrs. *Wilkie, Welsh & Co.*

" The pipes you have sent are useless to us, not being the weight stated to our Mr. *Hunt*, and unless you can send them of that weight, about ten and a half cwt., we shall be obliged to cast them after all. The pipes are lying at the station to your order.

" HUNT & OPIL."

An electric telegram of the same purport from *Hunt & Opil* to *Wilkie, Welsh & Co.*, had preceded on the 24th the above letter of the 24th.

" 24th March, 1864.

" To Messrs. *Hunt & Opil.*

" In answer to your telegram we believe you to be laboring under a mistake in stating the pipes you purchased were over 10 cwt. We never had in our consignment pipes of that or near that weight. We informed your Mr. *Hunt* that the weight (total) of over 10½ pipes invoice was of 40 pumps 10 tons 1 cwt. to 8 cwt. 6 qrs. 3 lbs. average each; and of 12½, total 40 pumps, 22 tons, 2 qrs. 2 cwt. to 11 cwt. 11 lbs. average. On looking also in our old invoices, we all find that 10½ pipes average from 8 cwt. to 8½ cwt. Therefore, as we have not in stock pipes of such weight as you mention, we could not either offer them to you for sale or you to purchase them from us. We therefore insist that the pipes which we have sent you are those you purchased, and you have examined before purchase. In the expectation you will find we are correct,

" We remain, &c.,

" WILKIE, WELSH & Co."

It was contended for Defendants that there was nothing in the correspondence itself, without extrinsic evidence, to identify any pipes as sold; and that extrinsic evidence for such a purpose was not admissible.

Verdict for the Plaintiff, with leave on these points to move to enter a nonsuit.

A rule *nisi* had been obtained.

Ireland, Q. C., and *Fellows*, for the rule.

Dawson and *Harris* for the verdict.

The authorities cited were *Bailey v. Sweeting* (b), *Lickbarrow v. Mason* (c), *Bryans v. Nix* (d), *Gillet v. Hill* (e), *Campbell v. Mersey Docks' Company* (f), *Furlay v. Bates* (g), *Waite v. Baker* (h), *Alexander v. Gardner* (j), *Wigram on Extrinsic Evidence* (k), *Carroll v. Cowell* (l), *Shortrede v. Cheek* (m), *Bateman v. Phillips* (n), *Starkie on Ev.* (o), *Johnson v. Dodgson* (p), *Spicer v. Cooper* (q), *Macdonald v. Longbottom* (r), and *Mumford v. Gatton* (s).

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STAWELL, C. J.—To hold this contract sufficient within the Statute of Frauds would in fact be to admit the very evils which by that Statute it was intended to prevent. The identity of these pipes was the very matter about which they were contracting, and the very matter now in difference between them; and to allow parol evidence of that would in such contracts be dispensing with the statute altogether. If the letters had said “the pipes I saw,” or “the pipes in your store,” or anything of that sort, parol evidence would be admissible to shew what pipes were seen or were in the store: Such a phrase would be but a circuitous description. But here there was no description at all—simply the words, “the pipes” throughout.

We are of opinion that there was no contract under the statute and no acceptance.

Rule absolute for nonsuit.

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| (b) 30 L. J., C. P., 150. | (l) 1 Jebb & Symes, 43. |
| (c) 1 S. L. C., 611. | (m) 1 A. & E., 57. |
| (d) 4 M. & W., 775. | (n) 15 East., 272. |
| (e) 2 Cr. & M., 530. | (o) p. 678. |
| (f) 14 C. B., N. S., 112. | (p) 2 M. & W., 653. |
| (g) 33 L. J., Ex., 43. | (q) 1 Q. B., 424. |
| (h) 2 Ex., 1. | (r) 1 Ell. & Ell., 978. |
| (j) 1 Bing., N. C., 671. | (s) 7 C. B., N. S., 305. |
| (k) Ed., 1858, Proposition V., p. 65. | |

1864.

July 5.

THE BANK OF AUSTRALASIA *v.* ERWIN.

A bill drawn on *E.* for £60 on a printed form was handed to him for acceptance. *E.*'s sight was weak, and he supposed the sum of £60 was properly written in writing and in figures on the bill. He accepted as for £60. After *E.*'s acceptance the drawer, or some person with his consent, inserted before the word "sixty" the words "one hundred and," and before the figures "60" the figure "1," thus changing the bill to one for £160. This fraud was rendered perfectly easy by the manner in which the words and figures of the amount originally written were filled in. The bill, as fraudulently

AN action by the endorsees of a bill of exchange against the acceptor. The defence was that, when the Defendant accepted the bill, it was a bill for £60 16s. 4d., and that after acceptance and before delivery to the drawer it was fraudulently altered by him, or with his consent, to a bill for £160 16s. 4d.

At the trial the jury found that the bill was fraudulently altered, as pleaded by the Defendant, and without his knowledge or consent, but that the Defendant had contributed to the fraud by negligently accepting the bill in such a form as to make the fraud perfectly easy.

The bill had been drawn on a printed skeleton form of the usual sort, having a line or band shaded differently from the rest of the bill on which to write at length the sum of money drawn and accepted for, and having at the extreme left hand end of the shaded band the capital letter £. As originally drawn, the words and figures "sixty pounds 16s. 4d." were written some distance from the capital £, leaving a blank space exactly sufficient to contain the very words which the jury found to have been afterwards fraudulently inserted. The acceptor's sight had been weak and bad, and he had relied on the drawer for the correctness of the form in which the bill was drawn. The amount in figures had also been written so that an additional figure 1 was easily inserted between the £ and the figures 60 16s. 4d.

altered, was endorsed and delivered to the *Bank of A.*, who had no notice of the fraud. In an action by the bank on the altered bill for £160, there was a verdict for the Plaintiff. On rule nisi, obtained by the Defendant, to set aside the verdict,

Held, that *E.*, by his negligent conduct, must be deemed to have made the drawer his agent to alter the bill; and that the verdict must stand.

The verdict was for the Plaintiffs, but leave was given to move the Court.

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v.
ERWIN.

A rule *nisi* was obtained accordingly.

Mackay, Wood, and Harris for the rule; *Ireland, Q. C.*, and *Fellows* shewed cause.

The authorities cited were:—*Burchfield v. Moore* (t), *Master v. Miller* (v), *Grote v. Miller* (w), *Roberts v. Tucker* (x), *Awde v. Dixon* (y), *Clarke v. Cock* (z), *Ingham v. Primrose* (a), *Montagu v. Perkins* (b), and *Young v. Grote* (c).

STAWELL, C. J.—The facts of this case were singular. [His Honor recited the facts as above.] The jury have found that the drawer, or, if not the drawer himself, some person with his consent, as the bill never left his hand until it came to the bank, filled up the blank left before the words and figures sixty pounds so as to make it an acceptance for £160; that in that condition it was taken to the bank, and that it was discounted by them as an acceptance for the larger sum under circumstances not calculated to raise the slightest suspicion that the bill had been tampered with after acceptance. The question now is whether the bank can recover under those circumstances. It is contended for the Defendant that—having accepted the bill and delivered it over as a complete document, and the alteration of it having been made without his knowledge or consent, there can be no presumption of agency or authority to make the alteration, and that he is therefore not liable, although it is admitted that if this

(t) 3 ELL. & BL., 683.

(v) 1 S. L. C., 458.

(w) 4 Bing., 253.

(x) 18 Q. B., 560.

(y) 6 Ex., 869.

(z) 4 East., 57.

(a) 7 C. B., 82.

(b) 22 L. J., N.S., C. P., 187.

(c) 4 Bing., 253.

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had been the case of a cheque, and not that of an acceptance, he would be liable. I confess that I can see no sound distinction between the two cases. The principle involved in both is simply one of agency. If there are two innocent persons, the acceptor and the holder of a bill—the present Defendant and the Plaintiffs—one of whom must suffer, and the question is which of them it is to be; the law says that the person who has facilitated the fraud shall bear the injuries resulting from it. By facilitating this addition he has prevented himself from denying—he is in effect estopped from denying—that he made the person who made it his agent for the purpose of making it. In *Young v. Grote* the customer appointed his wife his agent—she appointed a clerk her agent to fill up a blank cheque for a certain sum—under ordinary circumstances the clerk was not and could not have been deemed an agent to bind the wife for the larger sum. He had exceeded his authority—still less could he be the agent of the husband—*delegatus non potest delegare*; yet the customer is held liable for the full amount. “By signing the cheque in blank he had given authority to any person in whose hands it was to fill it up in whatever way the blank permitted.” So here the acceptor left a blank. The finding of the jury renders his intention in so doing immaterial—having left that blank he cannot now be permitted to deny that he constituted the drawer or other person his agent to fill it up. The principle of *Young v. Grote* governs the present case. It may be a hard case on the Defendant, because on his part it was not an intentional or willing neglect—though certainly it would have been more prudent for him to have said that he could not see, and to have asked another person to read it over that he might judge if it were correct. But we cannot infringe a broad principle of law to meet the hardship of this particular case. The case of *Orr v. Dickson* was between the immediate parties to the document. As between such parties, the same or similar facts, as in the present case, would no doubt be a perfectly good defence.

BARRY, J.—I confess that I was much pressed by the distinction at first drawn by counsel between acceptances and cheques; but I find that such a distinction cannot be maintained after the judgment given in the case of *Burchfield v. Moore* cited; and that instruments such as this, when once launched into circulation, and becoming part of what has been called the mercantile currency of the country, must, notwithstanding such circumstances as the jury have found in this case, be regarded as entitled to respect in the hands of *bond fide* holders for value. [His Honor read a passage from the case of *Burchfield v. Moore*.] The distinction between acceptances and cheques is not therefore regarded as entitled to the weight which I was inclined to give to it. It is distinctly recognized that the same principle is applicable to both classes of instruments in the hands of a *bond fide* holder when once launched, and coming to his hands as the present bill came into the hands of the Plaintiffs.

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WILLIAMS, J.—When the acceptor, by his neglect, facilitates fraud on other innocent persons guilty of no neglect, it is he, and not they, who must abide the consequences of the fraud.

Rule nisi discharged.

NOTE.—See, however, *Lea v. Graham*, before the Supreme Court of New South Wales, reported in 1 *Wilkinson and Owen*, 288.—Ed.

1864.

June 24.
July 5.

PEACHMENT, APPELLANT, v. CONLON, RESPONDENT.

C. and T. entered a licensed hotel in Melbourne to drink. P., the landlord, ordered the barmaid not to serve C., and he was not served. T. asked if he could be served, and was answered "Yes." C. poured out wine for himself, put down a shilling, and was about to drink, when P., the landlord, assaulted him violently, and ejected him from the bar. C. summoned P. before justices for the assault. At the hearing, P.'s counsel offered evidence in mitigation of damages that C. had seduced P.'s wife. The justices rejected the evidence, and awarded C. £5 as damages, with £1 3s. 6d. costs. On appeal, when it was conceded for Respondent that the evidence was improperly rejected,

CASE for the opinion of the Supreme Court, stated under the Act, No. 159, by the Police Magistrate in Petty Sessions, at Melbourne.

The facts and grounds of the appeal were stated as follows:—On Saturday, 2nd April, 1864, *Conlon* went into the Appellant's licensed hotel in Bourke-street, known as "*Morton's Hotel*," with *Teefer*, whom he had invited to take a glass of wine. The barmaid refused to serve *Conlon*, who heard *Peachment* tell the barmaid not to serve him. *Teefer* asked if he could be served, and the barmaid assented. *Conlon* then poured out a glass of sherry for himself, put down a shilling in payment, and was going to drink the sherry, when *Peachment* seized him by the collar, threw him on the ground, and there kicked and ill-used him. He was afterwards thrown out into the street by *Peachment's* servants. *Peachment's* counsel put questions to *Conlon*, and tendered letters alleged to have been written by him, with a view to the mitigation of damages, to shew that *Conlon* had had criminal intercourse with *Peachment's* wife; that *Conlon* and *Peachment* had had a previous dispute in consequence, and that *Conlon* had been cautioned not to go on the defendant's premises. It was admitted that *Peachment's* wife, immediately after this assault, shewed *Conlon* into a bedroom for the purpose of washing the blood from his face. It was contended for *Peachment* that the magistrate should require *Conlon* to answer the questions put, and admit the evidence tendered as above. The magistrate was

Held, that the decision of the justices in rejecting evidence which, if admitted, might have left the ultimate decision of the case the same, was not such a "determination" of the matter before the justices as was contemplated by the Act No. 159, sec. 11, giving the right of appeal; that there was therefore no appeal in the present case; and that the Court could not go into the appeal case at all.

of opinion that the evidence was inadmissible. He rejected the evidence, and awarded *Conlon* £5 as damages, with £1 3s. 6d. for his costs.

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v.
CONLON.

Fellows, for the Respondent, began :—This appeal must be dismissed, because conceding that the evidence was improperly rejected, yet the “determination,” that is to say the decision, one way or other between the parties, might have been the same if the evidence had been admitted. This Court does not interfere with the discretion of a magistrate on a mere question of damages. The Act No. 159, section 11, giving the right to appeal from the decisions of justices, says :—“After the determination by a justice of any matter which he has power to determine in a summary way by any law now or hereafter to be in force, any person who shall feel himself aggrieved by such determination as being erroneous in point of law, may apply,” &c. The word “determination” here used is a term of art, and means the final decision, one way or other, between the parties, not the determination of any question preliminary to the hearing, or in the course of the hearing, such as the admissibility or inadmissibility of evidence. Such, too, is the obvious meaning of the word in this clause. Determination “in any matter which he has power to determine in a summary way,” can surely be determination of the whole matter only, not of any part of it. Such, moreover, is the inference from a contrast of the words used here with those used in the Act No. 29, section 68, giving an appeal from the County Court to the Supreme Court :—“If either party to any cause holden under this Act shall be dissatisfied with the determination or direction of the said Court in point of law, or upon the admission or rejection of evidence, such party,” &c. A distinction is here drawn between determinations in point of law and determinations or directions upon the admission or rejection of evidence. If there be no distinction, and the latter were included in the former, why mention them in addition? It was intended in that Act to

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give the appeal in the latter cases, and they are therefore mentioned; it was not intended to give the appeal in this Act, and they are intentionally omitted. If, indeed, an appeal were given in every case in which justices wrongly admitted or rejected evidence, there would be appeals from every Court of Petty Sessions, and without number; so that it is unlikely, *a priori*, that such an appeal was intended. The decision in this case was not a decision in point of law within the meaning of this Act. If a justice says, "I will not have a particular fact proved at all," and that fact, if proved, would legally coerce him to decide for the opposite party, that is a determination in point of law such as this Act contemplates; but if he says merely, "I will not have that fact proved in a particular way," or if he says, "I will not have a particular fact proved," and the proof in that particular way, or the proof of that particular fact, would still leave him open to the same decision; in these cases there is no such erroneous determination as gives an appeal under this Act. *Rex v. Inhabitants of Carnarvon* (d), *Rex v. Inhabitants of Cambridgeshire* (e), *Rex v. Inhabitants of Monmouthshire* (f).

Aspinall for the Appellant.—Is it conceded that this evidence was wrongly admitted?—[*Fellows*.—Yes.]—The Justice in Petty Sessions has a sort of double function, sitting both as Judge on the law and as jury on the facts. He in a manner directs himself as to the law, and then, in obedience to such direction as Judge in reference to the law, he finds his verdict on the facts as a jury. If, therefore, he wrongly directs himself in law, it is a determination in point of law. If there had been assessors here, and he had rejected this evidence; or if, after it had irregularly got before them, he had directed them that it was no evidence on which they could base their finding on the facts, then such direction would surely

(d) 4 B. & Ald., 86.

(e) 1 Dowl. & Ry., 225.

(f) 4 B. & C., 844.

have been a determination in point of law. Again, how is it possible here to say which part of the "determination" is on point of law and which on point of fact? You cannot separate the question of the amount of the damages from the question of whether the decision is to be one way or the other? You cannot decide for the Plaintiff without giving him some damages, however small. At what point are you to say the question of principle ends, and the question of the mere degree of damages begins? Again, if the case be clear as to principle for 1s., and clear as to degree for £19 19s. (the largest amount permissible to inflict being £20), how is it possible to say all the "determination" is exhausted in the 1s., and none of it required for, or applicable to, the £19 19s.? But the other side say that there is no "determination" as to the £19 19s., and that, therefore, this Court cannot interfere. Surely, in finding as he did on the facts, and as to damages, he must be regarded as so finding, because he felt bound to exclude all the evidence in mitigation as to adultery and provocation. But he felt so bound under an error in point of law. The damages he gave were the necessary consequence of that determination. Thus the damages are necessarily included in his "determination," and his determination cannot be regarded as leaving them out. In this view, his erroneous and injurious decision is a matter from which the Act certainly intends and says that we should have an appeal.

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Mackay, as *am. cur.*, handed up *Cornwall v. Saunders* (g).

Cur. adv. vult.

STAWELL, C. J.—This was a case in the form of an appeal from magistrates. [His Honor read the case as

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(g) 32 L. J., Mag. Cas., 6.

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stated substantially above.] It was conceded on the argument that the evidence was improperly rejected; but contended on behalf of the Respondent, the complainant below, that the decision of the magistrate in so rejecting the evidence, however wrong, was not such a determination within the Act No. 159, under which this appeal is brought, as that we can now entertain an objection to it; that as the point decided did not affect the decision of the magistrate one way or the other between the parties, and as, in fact, a decision might, and indeed would, have been given in favor of the Respondent, though possibly for less damages, even if the evidence had been admitted, the decision was not such a "determination" of the matter before the judge as was contemplated in that part of the Act giving the right to appeal. [His Honor read the Act No. 159, sect. 11.] Now, the words there, "any party who shall feel himself aggrieved by such determination," evidently mean aggrieved by the ultimate decision of the case, not by a decision such as this in the course of the case. The object of the Act is to give an easy and economical mode of appeal on matters of law, after the justices have given their final decision. I do not think that it was the intention of the Legislature that every case should be brought before this Court on appeal, on every decision, to reject or admit evidence which might go only to affect the degree of damages, but could not affect the decision one way or the other between the parties. If it were otherwise, the present case might be remitted for the admission of this evidence, and yet a decision be still given in favor of the same party. I think it was not intended to give the right to appeal from such a decision. Under these circumstances, there was no determination from which there could be any such appeal as the present.

BARRY, J.—I am of the same opinion. The "determination" contemplated by the Act is the ultimate disposition, and has no relation to any interlocutory decision given in the course of the case, and before the final judgment.

If it were otherwise, this right of appeal would, indeed, be a hydra-headed right of appeal. On every decision on every point of evidence in the case, successive appeals might be prosecuted, while the result of all of them might leave the final determination of the justices untouched.

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Appeal dismissed.

DAVIDSON AND OTHERS, APPELLANTS, v.
THE STAWELL ROAD BOARD, RESPONDENTS.
LAMONT AND OTHERS, APPELLANTS, v.
THE STAWELL ROAD BOARD, RESPONDENTS.
CAMPBELL AND OTHERS, APPELLANTS, v.
THE STAWELL ROAD BOARD, RESPONDENTS.

June 28.
July 5.

SPECIAL cases stated by the parties in Court of General Sessions at Ararat, on the hearing of appeals from a rate made by the *Stawell Road Board*, by which rate the Appellants were assessed in respect of certain lands described in the rate. The General Sessions dismissed the appeal, affirmed the rate, and stated these cases.

D. and party,
L. and party,
and C. and
party, were
rated by the
*S. Road
Board* under
the Act No.
176, sec. 181,
for land. Each
party appealed

to the General Sessions on the ground that their land was a "mine," and exempt from rates under sec. 181. Their appeals were dismissed, and cases stated for the Supreme Court. The land held by D. and party was held under miners' rights. On it was a gold mine, worked by them, and buildings, and a steam-engine and machinery for crushing quartz. They used this machinery to crush the quartz raised from their own said mine, and also to crush quartz from other adjoining mines, held by them under miners' rights, along with other persons not interested in the land rated. The land held by C. and party was held under a lease from the Crown. On it was a gold mine worked by them, and an engine and machinery. They used this machinery to crush the quartz from their own said mine, and also to crush quartz from other adjoining claims held by them; and also to crush for reward the quartz of strangers. The land held by L. and party was held by lease from the Crown. On it there was no gold mine, but a steam-engine and machinery. They used this machinery to crush quartz from gold mines situated near, and held under miners' rights by them with other persons not interested in the land rated. In all three cases it was stated that the quartz containing the ore on being raised to the surface was not merchantable nor usually sold; but that the gold extracted by crushing was merchantable on leaving the machinery. *Held*, that in neither of the three cases was the land exempt from rates; and appeals dismissed.

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The facts peculiar to each appeal were thus stated:—

In *Davidson's* case—"The land rated as aforesaid was held by the Appellants under miner's rights, pursuant to 'The Gold-fields' Act,' and on such land was a mine of gold worked by the Appellants, and also certain buildings, under or in which was fixed a steam engine and machinery for crushing quartz. The Appellants used this machinery for raising and crushing the quartz, which they got from their said mine, and also for crushing quartz, which they obtained from other gold mines or claims adjoining and adjacent thereto, and which mines were held under miners' rights by the Appellants and other persons; the other persons referred to having no interest in the land rated."

In *Lamont's* case—"The land rated as aforesaid was held by the Appellants under a lease from the Crown, pursuant to the Act No. 148, and on such land was erected certain buildings under or in which was fixed a steam engine and machinery for crushing quartz. The Appellants used this machinery for crushing the quartz which they got from gold mines situated near the said land, and which mines were held under miners' rights by the Appellants and other persons; the other persons referred to having no interest in the land rated."

In *Campbell's* case—"The land rated as aforesaid was held by the Appellants under a lease from the Crown, pursuant to the Act No. 148, and on such land was a mine of gold worked by the Appellants, and also certain buildings under or in which was fixed a steam-engine and machinery for crushing quartz. The Appellants used this machinery for crushing the quartz which they got from their said mine, and also for crushing quartz which they got from certain claims of the Appellants adjoining their leased land; and when they had no quartz of their own,

"they employed their machinery in crushing quartz for other persons, who paid the Appellants for such crushing."

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In each case it was also stated :—"The quartz containing the gold ore on being raised to the surface is not in a marketable state as an article of merchandise, and is not usually sold. The gold which is extracted by the operation of crushing is marketable when taken from the Appellants' machinery."

In each case the question stated for the opinion of the Court was:—"Whether the said land is exempt from rating as a 'mine' within the meaning of the Act No. 176, sec. 181?"

Billing for the Respondents.—This engine is of other use than merely for raising the mineral of the mine belonging to the Appellants. It is even of other use than for crushing the mineral of the Appellants so raised. It is used to crush for other persons than those interested in the land rated. In one case it is used to crush for strangers at a profit. In these respects—even in the most limited one—the engine is not a mere adjunct to the mine. In *Rex v. The Overseers and Chapel Wardens of Bilston* (h), the engine was used solely to drain the iron mine. The observations of each Judge shew that if the engine had been used for any other purpose than draining the mine it would have been rateable. Mr. *Bainbridge*, in his book on mines, says, "When the ore or material has been washed and effectually separated from its native bed, and made merchantable, the operation of mining is complete. The mineral is then ready for a process of manufacture, and the property employed for all subsequent operations will be liable to be rated in the same manner as any other description of property used in the arts" (j). Now, here

(h) 5 B. & C., 851.

(j) 2nd ed., 1856, p. 478.

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the ore or material was separated from its native bed, and the operation of mining clearly complete. The book no doubt inserts those words "and made merchantable," but there is no authority cited for that remarkable qualification; and the rational doctrine is clearly that stated in the text without the qualification, namely, that the material is rateable as soon as the operation of mining is completed by effectually removing the ore from its native bed. Crushing quartz, containing gold mechanically mixed, cannot be a mining operation any more than coining the gold when it is extracted; nor any more than smelting copper ore at Swansea in Wales, which has been dug out of the mine in South Australia at the opposite side of the globe.

Fellows for the Appellants.—The book referred to clearly requires the ore to be merchantable before it is rateable. "*The Gold-fields' Act*," in fact, defines the verb "to mine," as including the operation of crushing rock or stone for the purpose of extracting the gold. Though, perhaps, the Act No. 176, sec. 181, and the Act No. 82, are not in *pari materia* yet one part of the legislation of the country about gold mines may be looked at to interpret another part of the legislation on the same subject. Could this mine, in fact, be completely used and enjoyed without this crushing apparatus? The assumption in *Rex v. Bileston*, that if the engine had been used for other purposes than draining the mine, was not necessary for the decision of that case, it was *obiter dictum*, if indeed *dictum* at all. The inference is rather the other way. *Purvis v. Traill* (k) was decided on the express words of the Act, exempting "societies for the purpose of "science, literature, or the fine arts exclusively;" unless solely for those purposes the exemption under the Act did not apply. The Act No. 176, sec. 181, does not say that the exemption is to operate in the case of mines, only when the land is a mine exclusively. The word "exclusively"

(k) 3 Ex., 344.

seems to be limited to the words following "mines," viz.—to hospitals, benevolent asylums, and buildings used exclusively for public or charitable purposes. A mine has no connexion with charitable purposes.

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Billing, in reply.—Only such machinery is exempt as is a necessary adjunct to this mine, and for strictly mining purposes, and it is rateable if used otherwise than as an adjunct to this particular mine, or for other than strictly mining purposes in reference to this mine.

Cur. adv. vult.

STAWELL, C. J.—The substantial question, common to all these cases was, whether certain quartz-crushing machinery was so far an adjunct to and part of a mine as to be exempt from rates under the Act No. 176, sec. 181. We are of opinion that the word "mines" includes every fair adjunct to the mine, and that adjuncts include not only machinery for the purpose of moving the earth to the surface, but also machinery necessary for making it into a marketable state. But we think it includes nothing beyond that, and certainly not machinery used for crushing other ore brought from other mines of the Appellants, or other ore belonging to strangers. In two of these cases the machinery was used for both those purposes, and so far could not be regarded as necessary adjuncts to the mine on the land rated. The questions in all the cases are resolvable into the single question whether the engine was simply an adjunct to the mine on the land rated. If it were not so, the land was rateable. I think that such was the case here, and that all the appeals must be dismissed.

July 5.

BARRY, J.—All machinery on the surface of the land used for purposes strictly subservient to the working of the

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mine should be regarded as part of the mine, within the exemption from rates. Machinery for removing materials from the bottom of the mine to the top, for ventilating the mine, for making and sending down gas to light it, for communicating by signals, and for all other purposes ancillary to the object of obtaining the mineral from the mine, should be regarded as of a different class from that which may or may not be used in doing work on the spot. The mere operation of separating the metal from the ore may or may not be performed near the mine or at the other side of the globe. To bring the machinery on the surface of the land within the exception, it should be as much a tool used for this latter purpose, or instrument, more or less complicated, for separating the ore from the rock or clay, as is any other description of tool or instrument used in the mine itself for the purpose of mining. All machinery, to be exempted, must have the character of being used for the purpose of extracting the mineral from the mine, or extracting the metal from that mineral; and not of extracting metal from mineral for other persons working other mines not connected with that in question.

Appeals dismissed.

CORIO ROAD BOARD, APPELLANTS v. GALLETTY,
RESPONDENT.

1864.

June 24.
July 5.

CASE for the opinion of the Supreme Court, stated under the Act No. 159, by the Police Magistrate and Justices sitting in Petty Sessions at Geelong.

Fellows, for the Appellants, pointed out that there was an original case and a supplemental one, and that the latter was not stated till after the time limited by the Act (No. 159), sec. 12.

Wood.—If the objection is insisted on and held good it will only result in this Court having to send back the original case to have it re-stated, with the matters added which are in the supplemental one.

Fellows.—I don't object to both being heard by consent.

STAWELL, C. J.—We will hear both as one by consent.

Galletly had appealed to the Justices under the Act No. 176, sec. 199, against a road rate, on the ground that it was unequal and unfair. The *Corio Road Board*, the Respondents before the Justices, objected that the notice of appeal was

objection that the appeal had then by the adjournment become too late. The Justices heard the appeal and decided against the rate. The *C. Road Board* appealed to the Supreme Court, and relied there not only on the two objections above-named but on another objection to the notice, not taken at all before.

Held, that at the adjourned hearing the Respondents waived the first objection, and were estopped from taking the second; and that on the present hearing the third could not be taken.

Semble that a notice of appeal to Justices in Petty Sessions from a road rate under the Act No. 176, sec. 199, should name a day for the hearing, and the hearing may be the first day after such day named, on which the Justices actually sit in Petty Sessions.

Semble that a notice of appeal to Justices in Petty Sessions from a road rate should on the face of it shew that the person appealing against the rate is a party aggrieved thereby within the meaning of the Act No. 176, sec. 199; and that if the notice describe such person as the "owner or lessee" and not as the "occupant" of the land, he will not appear to be a party aggrieved within the Act.

G. appealed to Justices under the Act No. 176, sec. 199, against a road rate. The *C. Road Board* (Respondents before the Justices) objected that the notice of appeal specified no day of hearing. The Justices decided against the rate, but adjourned to allow *G.* an opportunity of giving a fresh notice specifying a day. A fresh notice was given, specifying a day. On that day both parties appeared again, and the Respondents raised the further ob-

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not given in time. A notice had been originally given which fixed no date for the hearing. At the hearing the objection was made that the notice had no date. The magistrates adjourned to allow of the giving of another notice with a date for the hearing. A second notice with a date for hearing was given. At this day the Appellant attended and took part in the proceedings. The second notice was objected to on the ground that it was too late—more than a month after the rate. The first notice had been within the month. The magistrates entertained the appeal, and decided against the rate. They stated this case (original and supplemental) on the appeal of the Board.

Wood, for the Respondent, having to support the decision below, began:—The second objection, as to time, was not made below. But it is now objected both that the original notice was wrong in form, and that the second notice was not in time. As to the first objection, it was impossible that any date should be inserted in the notice of appeal, because there is no regular day for the holding of petty sessions. Justices in petty sessions hold their sittings when and where they please, and the parties can neither prevent their sitting before the day fixed and calling on either party present to go on; nor compel them to sit on the day, or on any day after the day, fixed; nor prevent them from sitting on any day after that fixed when the appellants are not present but the respondents are. It is because of this uncertainty that the notice is not required to be given at "the next sessions," as is required in sec. 200, giving an appeal from petty sessions to general sessions. The sittings of general sessions are at fixed known dates, and the notice can be given for those days; the days of the sittings of petty sessions are unknown, and the notice cannot name them. As to the inconvenience of causing parties to attend *de die in diem* till the case is heard, it will occur equally whether a date is named or not, if the date be one on which the parties have no power to insist that the appeal be heard.

[*Stawell*, C. J.—Is it not better to fix a day on which it is probable the justices will sit; and then, if they do not sit, does not the notice stand good for the first day after that named in the notice on which the justices find it convenient to sit?—The first proper day is as good a *terminus a quo* from which to begin attending as any fixed day, so long as the parties have no power to compel the justices to sit on any day whatever. The second objection is, that the second notice was not in time because it does not appear, and is not shewn by us, that it was within the month after the rate. Firstly, that objection was not taken below, and is not now open. Secondly, it lies on them, and not on us, to shew that it was not in time. No doubt we must shew that it is, on the face of it, a good notice. We do that by shewing that it is good in form. The defect as to time is not part of the notice itself, but a fact *dehors* the notice. That fact, if they rely on it, they must shew. But the date of the rate does not appear; and the Court will not assume that our second notice was too late, especially when the Court was obviously adjourned solely to enable the Appellant to give the fresh notice.

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Fellows, for the Appellants.—As to the original notice: The words in section 199, “and at the sessions for which such notice is given,” clearly point to a sittings indicated by date in the notice, and not merely the next sittings. The contrast relied on by the other side between sections 199 and 200 is against rather than for them; for where the sittings are on fixed dates, as those of the general sessions referred to in section 200, no date is given, but the appeal is to be to “the next court of general sessions;” but where the times of sitting are not fixed by law, or the practice of the court, as with the sittings of justices in petty sessions referred to in section 199, there a date is fixed that the parties may know against when to get up their case, and when to bring up their witnesses. The justices will, no doubt, sit when asked, or will fix a day beforehand which

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can be inserted in the notice of appeal. As to the second notice, if it were not in time it is bad, because the Court had no power to adjourn. The Act says "no such appeal shall be entertained" if not in time. So if the first notice were not good to give a jurisdiction, the matter could not be entertained; and if it could not be entered on it could not be adjourned. Then the second notice is not in time. That is a matter for them to show, being a matter giving jurisdiction. If not for them to show, but for us to negative, then the case negatives it by inference; for the inference is that if the case had not been adjourned it would have been too late to give a second seven days' notice within the unad-journed remainder of the month after the rate. But there is also another point. The second notice does not shew that the Appellant is the party aggrieved. Such party must, according to section 183, be the occupant, and not the owner or a mere lessee not in occupation. But the notice here mentions the land as "owned or leased" by the person appealing against the rate. *Local Board of Health of Gloucester v. Chandler (l)*, *Rex v. Justices of Lancashire (m)*, *Reg. v. Justices of York (n)*, *Rex v. Justices of Lincolnshire (o)*, *Rex v. Justices of Oxfordshire (p)*.

Wood, in reply, cited *Rex v. Justices of Somersetshire (q)*.

Cur. ado. vult.

July 5.

STAWELL, C. J.—In this case there was an original case first stated, and then a supplementary case added by the magistrates, and by consent we heard them as one. *Galletly* thought himself aggrieved by a road rate struck by the Corio Board, and appealed to the Justices. His notice specified no day for the hearing, so that it appeared

(l) 32 L. J., Mag. Cas., 66.

(m) 1 B. & Ald., 630.

(n) 7 B. & C., 618.

(o) 3 B. & C., 548.

(p) 1 M. & S., 444.

(q) 7 B. & C., 678.

impossible to know when the seven days either began or ended. The Court of Petty Sessions, however, entertained the appeal, and decided against the rate. A case was stated by the Justices on which the simple question was whether that decision was right. But afterwards another case, the supplementary one, was stated, from which it appears that the decision at the first hearing was not a final one, that that hearing was adjourned to enable a fresh notice to be given, that such notice was given, specifying a day for the hearing; that the magistrate sat again, and the case came on again under the second notice; that both the parties attended under that fresh notice, and that the case was fully gone into, and the original decision confirmed. It is now contended that the Petty Sessions could not go into the case the second time; that the first objection was still good, as it prevented the case from being entertained, and therefore from being adjourned; and also that the second notice was too late. There is also a third objection founded on the terms of the original notice, that it did not shew the Appellant against the rate to be the party aggrieved within the Act. The original notice ran thus as to the last point; it spoke of the land as "land leased or "owned by me." It is contended that a person who so described himself could not be deemed by the Court entertaining his complaint as the "occupant" of the land. No doubt a grave question might be raised on a notice in that form, but if the second notice was given and accepted, and all parties attended on it, we think the objection to the first was waived. We think also that the second and third objections are not now open to the Appellants. The second decision of the Court of Petty Sessions was therefore substantially correct.

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BARRY, J.—If the objection now appearing had been taken at first I am of opinion that it would have been a good one. The notice should shew that the person appealing from the rate is the party aggrieved by it. But an objection

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different from that was taken, and, as if by consent of the parties, the hearing was adjourned to allow that objection to be cured by a notice in the correct form, specifying a day for hearing. On that second hearing all parties attended. At that hearing the Appellants ought certainly to have been confined to objections, which could have been taken by them at the first, and were so taken. But a new objection was then made, which could not have been taken at the first hearing, and which could only arise by the very consent given to cure the original objection. And now it is sought to raise not only the first objection which was waived, and the second objection which could not have been taken, but also a third objection which might have been taken at both hearings, but was taken at neither. If a person possess a sheaf of arrows of this sort, he must at all events launch them at the proper time.

WILLIAMS, J., concurred.

Appeal dismissed.

July 6.

The "*Passage Brokers' Act 1863*" does not contemplate that owners of ships, and their managers, should be licensed as brokers.

S., the manager of the office in Melbourne of the *P. & O. Steam*

Navigation Company, not being duly licensed to act as a passage broker, let a passage by a ship of the company from Melbourne to Ceylon, and was convicted therefor. On appeal,

SPARKES, APPELLANT v. MACFARLANE, RESPONDENT.

CASE for the opinion of the Supreme Court, stated under the Act No. 159, by the Police Magistrate in Petty Sessions at Melbourne.

James Macfarlane, emigration officer, informed against *John Sparkes*, agent in Melbourne of the *P. & O. Steam Navigation Company*, for that he did on the 26th May last act as a passage broker without being duly licensed so to do

Held, that he was not liable to the penalty ; and conviction reversed.

pursuant to the "*Passage Brokers' Act 1863*" (r). It was admitted between the parties that the *P. & O. Company* were carriers by sea in their own ships from Melbourne to England; that the company has a branch office in Melbourne managed by *Sparkes*; that *Coleman* was a clerk employed by *Sparkes* for the company; that *Coleman*, for *Sparkes* as such manager, let a cabin passage by the company's steamship *Madras*, from Melbourne to Ceylon, on the way to England, to *Alexander Macfarlane*; and that *Sparkes* was paid by a salary from the company, and had no fee or commission on the letting of the passage, and did not act as an agent or broker for *Alexander Macfarlane* in the selling.

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The Police Magistrate convicted, and, on the appeal of *Sparkes*, stated this case.

Mackay for the Respondent.

Dawson and Fellows for the Appellant.

The authorities referred to were:—15 and 16 *Vic.*, cap. xliv, sec. 66; *Gibbon v. Rule* (s), *Milligan v. Wedge* (t) and *Martin v. Temperley* (v).

STAWELL, C. J.—It was never contemplated that owners and their managers should be licensed as brokers. The Act was aimed at another class altogether.

BARRY, J.—A class in respect of which it was requisite to give the public some security. It is quite different where the recognised proprietor, or his agent, is on the spot.

Appeal allowed; conviction reversed.

(r) No. 174.
(e) 4 Bing., 301.

(t) 12 A. & E., 737.
(v) 4 Q. B., 298.

1864.

June 29.

July 6.

Proceedings in New Zealand before magistrates sitting merely to commit for trial and not to hear and determine—acting ministerially and not judicially—are within the meaning of the “*Evidence Act*” No. 100, sec. 37, and may be proved in Victorian Courts by copies of them authenticated in the way pointed out by that Act.

EASTWOOD *v.* BULLOCK.

TRESPASS for false imprisonment, here and in New Zealand. At the trial certified copies of proceedings before justices in New Zealand—information, watch-book, depositions, warrants of commitment and remand, &c.—were tendered as evidence under the “*Evidence Act*,” No. 100, sec. 37, objected to as not within the Act, and received subject to the opinion of the Court. The verdict was for the Plaintiff; but a rule *nisi* was obtained to enter a verdict for Defendant.

Fellows and *Dobson* for the rule.

Dawson shewed cause.

The authorities referred to were:—*Co. Litt.*, 58a; *Dwarris on Statutes*, 566; *Garrett v. Ferrand (w)*, *Oke's Synopsis (x)*.

Cur. adv. vult.

July 6.

STAWELL, C. J.—This was a rule *nisi* to enter a nonsuit, on the ground that copies of documents were received which were not receivable as evidence under the “*Evidence Act*,” These documents were properly authenticated documents of proceedings before Courts in New Zealand, and were offered under the 37th section of the Act. There is no doubt as to the form of the authentication; but it is contended that the section does not apply to such documents; that the words of the Act contemplate only proceedings of a judicial nature, and that, inasmuch as magistrates sitting in petty sessions merely to commit for trial, and not to hear and determine,

(w) 6 B. & C., 625.

(x) Ed. 1858, p. 2.

are acting ministerially only, and not judicially, the section does not apply, and the documents are not made admissible by proof of them in the manner specially provided by the Act. The section not only enacts that the proceedings of any court of justice, or any person having authority to hear, receive, and examine evidence, may be proveable in the manner provided, but it also enables such proof to be made of affidavits, pleadings, and other legal documents filed or deposited in such court. The mode provided is twofold—either by “examined copies,” or by copies authenticated in the manner pointed out by the Act. The construction contended for on behalf of the Defendant is, in my opinion, not only too narrow in reference to the general object and the spirit of the Act, but also, I think, does violence to some of its terms. The words “and other legal documents,” are used. Now, clearly these are legal documents. The mode of proof provided, and the character of the matters to be proved, shew I think that almost every document that ought not to be removed from its place of deposit, from its being of a public character, may be proved in this way. The questions to be asked are—is this document of a public character; and can it not, consistently with public convenience, be removed? If so, it falls within the meaning of the section, and is provable in either of the two ways pointed out. I think, too, that this section, applying expressly to all the British dominions, should receive as liberal a construction in aid of proof as is possible. It is intended to facilitate proof, and I think it was the obvious intention to meet a case of the sort which has here occurred.

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BARRY, J.—There was one of these documents, which I believe this Act does not extend to—the extract from the watch-house book. That, however, is entirely unimportant, as this case did not turn in any degree upon that part of the evidence. But the other documents are of the nature contemplated by this clause. The information is a “pleading.” The warrant is a “legal document;” for though it

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was contended that such legal documents as "warrants of attorney," and instruments of that sort, are alone intended, I am inclined to think that the words are used in a wider sense, and are intended to include every document coming within the scope of the words "legal document," in their popular sense. The depositions are included in the terms "deposited in any such Court," &c., and the warrant also. With the sole exception of the extract from the charge-book, on which piece of evidence the case could not turn, I think all these documents within the meaning of the Act.

WILLIAMS, J.—I also am inclined to lean to a liberal construction of the "*Law of Evidence Act*." The enactment making the proceedings of any Court of justice, or person of the sort described in the Act, whether these proceedings are under seal or not, provable in the manner pointed out, I think contemplated proceedings of Petty Sessions such as these.

Rule nisi discharged.

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DEMURRER to declaration. The declaration referred to the Act 6 Vic., No. 7, sections 1 and 82 [which incorporate Melbourne, and enact that it shall be lawful for the said Council, and they are hereby authorised, empowered, and required from time to time, when and as often and in such manner as they shall think proper and necessary to order and cause the several streets, &c., which are now, &c., adopted as public or common highways, &c., to be, &c., improved, repaired, or amended, supported and kept in good order and condition, &c.]; averred that, though the Council had moneys applicable and adequate to the purpose of, "amongst other things, the constructing, improving, amending, and keeping in good order and condition of a certain street or highway within the limits of the said city of Melbourne, to wit, Hawke-street, the same being at and before the time aforesaid adopted as a public highway or common thoroughfare," yet they neglected their duty, in that they did not repair, amend, and keep in good repair such street, but wrongfully permitted a deep trench or water-worn watercourse to be therein, so that the street was dangerous to passengers after dark; and left such trench unguarded, whereby the Plaintiff, lawfully passing after dark, fell into the trench, "and was much wounded and bruised in the body and limbs, and had certain of his ribs broken, and was sick and disordered for a long space of time," to the injury of his business, and to his cost for medicines and surgical attendance.

Under the "Melbourne Corporation Act," 6 Vic., No. 7, secs. 1 and 80, a full discretion is given to the Corporation as to whether or not, and when, they should "form" any proposed street.

Held, that where the Corporation had not yet exercised its discretion by "forming" a street in a certain place, and a person was injured by falling into an unfenced hole there, the Corporation was not liable.

Held for the demurrer.—(1) An action of this sort, for breach of a public duty, will not lie unless an indictment will lie. (2) An indictment will never lie unless where a public right is violated or a duty to the public omitted. (3) In

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those cases of denial or violation of public right where an indictment may lie, yet an action at the suit of an individual will only lie where the individual has suffered in a manner peculiar to himself, and not where he has only suffered generally the same wrong that all the public has suffered by the denial or violation of right. (4) In the present case, no absolute duty to repair was imposed on the Melbourne Corporation by their incorporating Act, but only an obligation to do so at their own discretion,—which discretion must, however, it was conceded, be a reasonable discretion. (5) Wherever a discretion is given to perform a duty or not perform it, no right of action in respect of the duty ever arises until the duty has been actually performed, and also ill-performed—no right of action ever can arise at all if the discretion is exercised by stopping short of any performance at all. *Russell v. Men of Devon* (y), *M'Kinnon v. Penson* (z), *Young v. Davis* (a), *Yielding v. Fay* (b), and *Metcalfe v. Hetherington* (c).

Mackay for the declaration.—The words of the Corporation Act imposing on the corporation the duty of repairing are obligatory, and leave no discretion. The early cases cited on this point shew that where a duty to the public is imposed, the word “may” is to be read “must;” the later ones gave instances where similar words to those in the present Act have been deemed so compulsory that a breach of the duty imposed is ground for indictment. The distinction between misfeasance and nonfeasance, though appearing on some of the early authorities, is now no longer law. Some of the later cases are indeed actions for a breach of duty by a mere nonfeasance. The cases also cited on the other side to shew that a parish or county cannot be sued are inapplicable, because in those cases

(y) 2 T. R., 667.

(b) Cro. Eliz., 569.

(z) 9 Ex., 609.

(c) 11 Ex., 257.

(a) 7 H. & N., 764. S. C. 31 L.

J., Ex., 250.

the Defendants were not incorporated, and the Defendants here are so. The general result of the later decisions is to shew that in its capacity to be sued for such a grievance as the one here complained of a corporation stands in the same position as an individual; and that where a statutable duty is imposed on a corporation all the same incidents follow that would follow from the imposition of the same duty on an individual. In the present case the Defendants are incorporated, a duty is thrown upon them, and the means given them, by the imposition of rates on the citizens, of performing that duty. The Defendants, by demurring in law to the declaration, admit all its facts, and so admit that there are funds applicable and sufficient for the repairs, that the repairs have not been done, and that the Plaintiff has suffered the injuries complained of in consequence of such non-repairs. Thus, the duty on the corporation being absolute, the means of performing the duty and the non-performance of it admitted, and the incidents to non-performance being the same in the case of a corporation as in the case of an individual, the Plaintiff's right to sue is established, and the declaration shewn to be good. "*Melbourne Corporation Act*," 6 Vic., No. 7, secs. 1, 80, 82, and 93; *Key v. Mayor of Sandhurst* (d), *Bayldon and Graham v. Corporation of Geelong* (e), *Sir John Popham v. Prior of Bremour* (f), *Mayor of Lynn v. Turner* (g), *Mayor of Henley v. Mayor of Lyme Regis* (h), *Reg. v. Great North of England Railway Company* (j), *Reg. v. Birmingham and Gloucester Railway Company* (k), *Ruck v. Williams* (l), *Whitehouse v. Fellowes* (m), *Hartnell v. Ryde Commissioners* (n), *Gibbs v. Liverpool Dock Company* (o),

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(d) Sup. Ct., Vic., E. T., 1864.
(e) Sup. Ct., Vic., 1852.
(f) 11 Hen. 4, pl. 28.
(g) 1 Cowp., 86.
(h) 5 Bing., 91. In error 3 B. & Ad., 77. In *Dom. Proc.*, 2 Cl. & Fin., 343, and 8 Bli., N. S., 711.

(j) 9 Q. B., 325.
(k) 3 Q. B., 223.
(l) 3 H. & N., 316.
(m) 30 L. J., Q. B., 305.
(n) 33 L. J., Q. B., 39.
(o) 3 H. & N., 164.

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Harris v. Baker (p), *Rex v. Mayor of Stratford on Avon* (q),
Viner's Abridgement (r), *Alderman Blackwell's Case* (s),
Leader v. Moxon (t), *Duncan v. Findlater* (v), and *Trustees of Heriot's Hospital v. Ross* (w).

Cur. adv. vult.

July 6.

STAWELL, C. J.—This was an action by a person injured by falling into a chasm in a street “not formed” by the Corporation of Melbourne. To this a general demurrer, that such an action could not be brought against the corporation. Great industry and research were exhibited in bringing all the cases bearing on the subject under review before us. We felt much assisted by those cases so expounded, as shewing the state of the law, independently of any statutory enactment.

From them it is now beyond doubt that, whatever may have been the law as formerly interpreted, individuals may be made liable for a nonfeasance, as well as for a misfeasance, by which another suffers; and also that there is now no longer held to be any sound distinction between individuals and corporations in respect to such liability. Any such distinction which may hitherto have been supposed to exist has in the later cases been more and more diminished, till it has been ultimately altogether obliterated. If, therefore, the law were to be regarded, apart from special enactments, the Court would be warranted in coming to the conclusion that the corporation was liable in the present case. But the Court must go to the Act of incorporation itself, and see whether the duty of reparations which is imposed thereby is one which the members are bound to discharge

(p) 4 M. & S., 27.
 (q) 14 East, 347.
 (r) Vol. XVI., p. 519.
 (s) 1 Vern., 152.

(t) 2 W. Bl., 924.
 (v) 6 Cl. & Fin., 894.
 (w) 12 Ib., 518.

at all events, or merely one which the Act leaves them to discharge at their discretion.

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In reference to such a discretion, if given, a distinction was clearly pointed out in the argument between the case of a discretion to begin a work or not—to do or not to do the work at all—and the after exercise of the discretion in the execution of the work well or ill, when once it has been begun. If there be a discretion to begin or not, no liability attaches for not beginning the work at all; but if the discretion is once exercised by beginning, then a duty arises to go on properly, and a liability arises if injury occurs from neglect in perfecting the work, or from carrying it out improperly. Thus the corporation may, if there be a discretion confided to it as to beginning, decline to begin the work at all; but if they begin the work, they are bound to go on with it, and neither stop abruptly without reasonable and sufficient cause, nor finish it improperly; and, if they do either, they are liable for injuries which result therefrom.

In that aspect this case turns mainly, if not altogether, on the 82nd section of the "*Corporation Act*." Throughout that section the words are repeated again and again, "when and as often as the council shall in their discretion think fit." In other words, the time and the circumstances and mode and manner of carrying out the whole of the purposes referred to in this section are all left entirely to the discretion of the corporation; those words of discretion being repeated, almost unnecessarily, as might have been thought, throughout the section.

It being discretionary altogether whether the corporation shall make these improvements or not, are they to be mulcted in damages for the exercise of that discretion. They are responsible in other ways to the citizens who elect them, for not exercising a sound discretion in this respect. The mere averment in the declaration, that there are funds sufficient

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for the making and repairing of this particular street, does not take the case further ; it does not affect the discretion given to them as to which improvements they shall first undertake, and which requirements are most urgent to meet.

When it is remembered in what state all young corporations are found when such Acts are passed, in many instances, little more than a piece of waste ground being handed over on which to form a town or a city, it is obviously necessary to leave them to judge what to attempt first, having regard to the public wants and the means at their disposal. I think that these words, reposing this ample discretion, were wisely inserted, and that we are bound to give them their fair, but full, force ; and, giving such force, I think that this action will not lie.

BARRY, J.—This case was argued on behalf of the Plaintiff as if it were incumbent on the corporation to fill up the deep trench worn by water in the earth, and as if the corporation had no discretion whatever in the matter, but were bound to form Hawke-street, and fill up the trench. However, the Act clearly gives the corporation a full discretion whether to form the street or not, and when to form it. *Gibbs v. The Liverpool Dock Company* appears to have differed materially in its guiding facts from the present case. In that case, the dock company, knowing that the dock was in an unsafe state—when under no obligation to receive the ship—when they might, in fact, have closed the gates against the ship—nevertheless chose to admit her. They thereby, having undertaken a duty, became liable for the consequences of their imprudence and improvidence. A contract thus arose. No obligation can be said to have existed here either originally under the Act, or subsequently by the omission on the part of the corporation. The Act gave full discretion to the corporation to withhold its hand altogether from the formation of this street for such time as in its discretion it should think fit. There is nothing to shew that

the corporation has ever yet exercised the discretion thus given, by commencing the formation of the street; nothing to shew that it ever undertook any work in the course of which injuries were caused by its neglect or the omission of such safeguards as would have been necessary in the prosecution of the undertaking. The preliminary exercise of discretion not being averred or shewn, the principles acted on in the Liverpool Dock case cannot apply here. The corporation alone are the judges of whether or not, and when, they shall exercise their discretion. We are judges only of the manner in which they carry out the duty cast on them after such discretion has been exercised.

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It is exceedingly reasonable that the law should be such as we deem it actually to be. The corporation is alone able to judge whether one street should be formed before another, or new streets formed before existing streets are repaired. They alone can judge which of the public requirements in different places are most imperative. They also alone can judge of their own pecuniary means, and the more judicious application of them to one place in preference to another.

The Court has been greatly assisted by the learned arguments of counsel, and has much reason to be satisfied that it is not now pronouncing a hasty decision on a matter affecting great interests throughout the whole country.

WILLIAMS, J.—It appears to me that the whole question turns on section 82 of the "*Melbourne Corporation Act*." The meaning of that section I think, to be quite apparent. Various places or streets may be in a bad state, and it was reasonable that full discretion should be given to the corporation as to the order in which those places or streets should be repaired or formed. If it were not so, all must be done immediately, though the means of doing all did not exist. The corporation has full discretion given it to determine the proper time for forming the streets—the

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proper time with reference to the wants of the public—and its own opportunities and means of meeting those wants. In this case they had not yet exercised their discretion, and were not liable.

Judgment for Defendants.

May 2, 3.
 June 23, 80.
 July 6.

RYAN AND ANOTHER v. STEPHENS.

The Victorian Association was established as stated by its prospectus, for the purpose of seeking out and promoting by all lawful means in its power the return to Parliament of men of liberal and enlarged views, who by experience, education, and character, were calculated to command the respect and enjoy the confidence of their fellow-colonists; and who would in their political career be

SPECIAL case stated by Counsel for the parties in an action without pleadings as follows:—

“The Plaintiffs at the date of the instrument hereinafter mentioned were treasurers of the Victorian Association, and continued so for upwards of one week from the date thereof. On the day of the date thereof the Defendant signed and addressed to the Plaintiffs an instrument in the words and figures following:—

“ ‘Melbourne,

“ ‘7th July, 1861.

“ ‘To Charles Ryan and Herbert Power.

“ ‘In consideration of your continuing to act as treasurers of the Victorian Association for the term of one week from this date, I undertake to pay you the sum of one hundred pounds, by such instalments as the committee of the said association may from time to time require.

“ ‘£100.

“ ‘JOHN W. STEPHENS.’

“The said association was established for the purpose of seeking out and promoting by all lawful means in their

guided by a tenacious regard for the public welfare rather than by a desire to obtain the temporary approbation of any section of the community. On a case stated without pleadings, between the joint treasurers of the society and one of the members, in an action on the undertaking of the latter to subscribe to the funds of the society,

Held, that the association was not illegal, nor the member's undertaking a void one; and judgment given for the Plaintiffs.

"power the return to Parliament of men of liberal and enlarged views, who by experience, education, and character were calculated to command the respect and enjoy the confidence of their fellow-colonists, and who would in their political career be guided by a tenacious regard for the public welfare, rather than by a desire to obtain the temporary approbation of any one section of the community, the only effect of which has hitherto been to oppose to each other those who should be working side by side for a common object (y). The question for the opinion of the Court is, whether the instrument above set forth contains a contract on which an action can be main-

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(y) The above paragraph was in fact an extract from the prospectus of the association, which, in full, was as follows:—

"The originators of this association, viewing with regret the present unsatisfactory state of the colony, which they ascribe in a great measure to an absence of that degree of confidence in the administration of the Government which is so necessary to induce the employment of capital in all those departments of industry by which alone the unequalled capabilities of the country are to be fully developed, and being actuated by an earnest desire to uphold the credit of the colony at home and abroad, and to promote the prosperity of all classes (a prosperity which they conceive to be mainly dependent upon wise and temperate legislation), invite the cordial co-operation of all who have the welfare of their adopted country at heart.

"The mode in which they propose to carry out their views is, to seek out and promote by all lawful means in their power the return to Parliament of men of

liberal and enlarged views, who by experience, education, and character are calculated to command the respect and enjoy the confidence of their fellow-colonists, and who will in their political career be guided by a tenacious regard for the public welfare rather than by a desire to obtain the temporary approbation of any one section of the community, the only effect of which has hitherto been to oppose to each other those who should be working side by side for a common object.

"As there will necessarily be some expense incurred in giving effect to the views of the association, the assistance of those who may concur with them is invited, in order to raise a fund for this purpose, the expenditure of which it is proposed to place under the control of a committee, to be nominated by the subscribers.

"We, the undersigned, approving of the objects of this association, hereby promise to pay the several amounts hereinafter set down opposite our respective names, as and when they may be required by the committee."

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"tained? If the Court shall be of opinion in the affirmative, judgment is to be entered for the Plaintiffs, as by default, for £100 and costs; if the Court shall be of opinion in the negative, judgment of *non pros.* is to be entered for the Defendant, with costs."

Mackay and Wood for the Defendant.—A society for the purpose of putting the laws in force is against the policy of the law, and is illegal. The policy of the common law and the object of the statute law have been to throw on each individual citizen the responsibility of performing fully by himself, for himself, his own political duty in his own political sphere, whether that duty consist in the exercise of political rights or in the vindication of such rights from any threatened wrong. The "*Electoral Act*" in particular has done all that could be done in excluding exterior influences, whether that of wealth, or of power, or even the influence of the example of persons of high character. Every means of operating on the election of members of Parliament by any co-operative exertion, such as that of a society, is an illegal means. An object legal, and even in the highest degree laudable, if pursued by such means, becomes infected with the illegal taint infecting the means themselves. In *Kingston v. Pierrepoint* (z), a devise to secure by all lawful means a dukedom, was held void. *Egerton v. Lord Brownlow* (a), *Hilton v. Eckersley* (b), *The Berkeley Peerage case* (c), *Lives of Eminent Judges* (d), *Ashby v. White* (e), *Norman v. Cole* (f), *Harrington v. Deschappelles* (g), *Gilbert v. Sykes* (h), and *Year Book* (j), were also cited.

(z) 1 Vern., 5.

(a) 4 H. L. Cas., 1.

(b) 6 Ell. & Bl., 51.

(c) 8 H. L. Cas., 86.

(d) By Walsby. 126, *per Holt*, J.

(e) 1 S. L. C., 185.

(f) 3 Esp., 253.

(g) 1 Bro. C. C., 114.

(h) 16 East.

(j) 2 Hen. V., pl. 25.

Fellows for the Plaintiffs.—Of the cases cited the only ones analogous to the present one are *Kingston v. Pierrepoint* and *Egerton v. Brownlow*; but the peculiar object of the devise in each of those cases stamped it with illegality. It is the peculiarity of dignities that they spring spontaneously out of the pure grace and favor of the Crown; they cannot be compassed or brought about; a man can only by his own efforts make himself worthy of them; he must not in any way seek them, or use means to bring them about, and if he do so the means are base and the object illegal. No means of any sort, however apparently innocent, are free from the taint of the illegality of their object; and all means for such an end are illegal means. But here, where the object is not the attainment of a dignity, it may be compassed and brought about by many innocent, laudable, and effective means. There are many things to be done in an election involving expenditure. Such expenditure is legal, and the means of meeting such expenditure equally legal. The expressed objects of this society are legal ones. These legal objects can be followed effectively by legal means; and there must be no presumption, when legal means can be taken for pursuing undoubtedly legal objects, that illegal means will be taken by the committee who are to expend the money. It is not because the funds of the society may be abused that its objects, or means of attaining those objects, must be held illegal. The object here is to bring good candidates before the public, and by all lawful means secure their return. Those means do not point at or include—they, indeed, tacitly exclude—the exercise of any influence on the franchise of any elector, which would be an unlawful thing.

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STAWELL, C. J.—We wish this case to be put in the list June 22.
 and be spoken to again with reference to the bearing upon
 it of some remarks of the Judges in the case of *Egerton v.*
Brownlow.

June 30.

Fellows.—As to the case of *Egerton v. Brownlow* that
 was held an illegal devise, because to a peer, or the heir of
 a peer, and so might influence his vote.

Wood.—It was not held void on that ground merely.
 Lord *Brougham* contemplates the devisee using influence as
 a landowner as well as in his character of a peer. The use
 of “lawful means” is immaterial, as the object was unlaw-
 ful—the object extended to the whole colony; but one
 constituency has no right to interfere with the elections of
 another constituency.—[*Stawell*, C. J.—Do you contend
 that the members of the association are indictable?—I
 need not go so far as that. In *Hilton v. Eckersley*,
Crowther, J., and Lord *Campbell* held that the agreement
 could not be enforced, but that the parties were not liable
 to criminal proceedings.

Cur. ado. vult.

July 6.

STAWELL, C. J.—The Plaintiffs were the treasurers of
 the Victorian Association. The Defendant, as a member
 of the association, addressed the following note to them.
 [His Honor read the undertaking.] The special case then
 goes on to state the objects of the association. [His Honor
 read from the prospectus.] The question is whether the
 objects of the association are of such a nature as to bar
 the Plaintiffs from maintaining this action. Those objects,

so far as they are set out, are at first sight laudable, and might, no doubt, if carried out only by lawful means, be of benefit to the community. But it would be an affectation of purity to suppose that men joined together for these purposes would stop at what are termed lawful means, and not hesitate to press into their service others which could not be regarded as lawful. We ought not to scan motives or probabilities too closely, nor ought we to affect and pretend a purity which we know does not exist. Were it therefore necessary to decide on this ground, I am disposed to think that the tendency of this association would be to promote not by lawful means alone, but by any means available, the objects of the association. Members would be tempted to enlist the use of all means, bad as well as good, for the attainment of the end. That question, however, becomes of less importance under the circumstances of this case. The association was in existence when the Defendant signed the document by which he undertook to pay a sum to the Plaintiffs for their services. So that we have not now to consider the question as arising between members of an institution not yet formed, the tendencies of which are to be weighed before its existence; but as arising where an association has been in operation. In such a case can the Defendant aware of all its objects, and having signed an undertaking to its officers in consideration of their services, be allowed to defend himself from payment for the work actually done for him under the terms of that undertaking? The observations of the Chief Baron in the case of *Egerton v. Brownlow*, cited in the argument, shew clearly the distinction to which I am now referring. If the contract is made between persons proposing the formation of such an association, then its mere tendency—if towards illegality—may make the contract gratuitous and illegal; but if the agreement is for work done for members of an association already formed, then the mere tendency of the association, though illegal, is not enough to render the contract illegal.

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In the latter case there must be a direct opposition to the public welfare; in the former there need only be a tendency to the public mischief. Now, though I think there is a tendency to public mischief in the objects of this association, I cannot say that I think it so directly opposed to the public welfare as to make this contract gratuitous, and an action on it not maintainable by the Plaintiffs for services actually performed under it. Similar associations are not unknown in the old country. [His Honor referred to such societies as the Catholic Emancipation Society, Anti-Corn Law League, Carlton, and other clubs and associations for watching over and effecting changes in the registration of voters in England.] Indeed, if the objects of this association are to be deemed directly opposed to the public welfare, I see no alternative but, as a consequence, that all the members would be guilty of a misdemeanor in joining it. To hold, however, that the members committed a misdemeanor merely because they associated themselves together for objects which might, but need not necessarily, be obtained by unlawful means is farther than I can go. I think the Plaintiff entitled to recover.

BARRY, J.—A variety of topics have entered into the able arguments of counsel on this case, but they may, I think, be pinned down to the tests generally applied to matters of this sort; matters in which the basis of the Plaintiff's right is a contract. The Plaintiff may have a right based on contract—all other requisites to a valid contract concurring—if the matter of contract be not either *malum prohibitum* or *malum in se*. Matters of the first sort embrace all those various subjects of arbitrary designation which have been made matters of offence solely by the regulations of the Legislature, upon grounds of policy unconnected with the moral law. For instance, in order to put down practices deemed injurious to the community as a society or a nation; for suppressing gambling, or for protecting the excise and increasing and protecting the public revenue

and means of public defence. It is not, however, necessary to touch further on this class of things prohibited as the principles applicable to things *malum prohibitum* are not applicable here; this is not a *malum prohibitum*. Is it then a *malum in se*? The general principle in the exposition of the law is that in the acts of public bodies and of individuals, illegality is not to be presumed. It is indeed to be presumed on the contrary that subjects are loyal, and that loyal subjects do not break the law. Is this such an association as that on the face of the terms of its documentary constitution now before us, we must, against the ordinary presumption that its objects will be lawfully pursued, hold that it is inconsistent with the principles and objects of society and the good government of the nation? The only mode in which it is suggested that this association can be so is through possibility of an abuse of its means and objects. But I think it a strained, forced and erroneous construction of the written constitution of the society to hold that it is contrary to the law of the realm, if otherwise unimpeachable, because possibly its members may abuse its powers and so cause mischief to arise. Such may happen to institutions the most venerable and admirable in the state. At the threshold, therefore, I deny the applicability of the test proposed. The apparent object of the society is a beneficial and laudable one, and I think it an abuse of terms to say that because such objects may be perverted the whole is illegal. I think, therefore, that the Plaintiffs are able to enforce the contract which is set forth in the case.

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WILLIAMS, J.—I think there must be judgment for the Plaintiffs. The undertaking was not gratuitous. The direct object of the association was not illegal; and that object is not forbidden either by moral or positive law. Nor is the mere tendency or possibility that the means of the association may be abused sufficient to make it an illegal association. I confess for myself that I think that

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the practical tendency of the association may be to render elections not so free or so pure as they might be; but I agree with my brother Judges that such mere tendency is not sufficient to render the contract gratuitous and void.

Judgment for the Plaintiffs.

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 Sept. 9 (k).
 1864.
 July 6.

COURTNEY v. WILSON.

S., in 1860, borrowed of W., his father-in-law, £1500, and gave W. a warrant of attorney and bond for the amount.

Judgment was not entered up on the warrant of attorney, but a writ was issued, and judgment entered up in the action.

In January, 1862, W., by

threats to put the sheriff in possession and by other great pressure, got from S. some cash payments, and a transfer of two bills of exchange. Within sixty days of the payments and transfer, S. absconded, and his estate was sequestrated. C., his official assignee, sued W. for money had and received, and in trover, for the proceeds of the bills. It was admitted that the cash payments were valid under the Act 5 Vic., No. 17, sec. 12, but contended that the transfer of the bills was absolutely void under sec. 8, although such transfer were involuntary, and there were no fraud in the preference of W. to other then existing creditors. The jury found for the Defendant; and found specifically that the transfer was made by the insolvent *bona fide*. On rule *nisi* to enter the verdict for the Plaintiff,

Held, after judgment reserved till a full report of *The Bank of Australasia v. Harris*, before the Privy Council, had been received from England; that as the transfer of the bill was not voluntary it was not defeated by the 5th Vic. No. 17, sec. 8, and rule *nisi* to enter verdict for Plaintiff discharged.

(k) Coram Stawell, C. J., Williams, J., and Molesworth, J.

AN action by the official assignee of *Thomas Stevens* to recover from the Defendant the proceeds of a bill of exchange transferred by *Stevens* to the Defendant. The proceeds were claimed on the ground that the transfer fell within the meaning of the 5th Vic., No. 17, sec. 8.

The declaration contained the money counts and a count in trover. Pleas to the first counts, never indebted; and to the count in trover, not guilty, and a traverse of the Plaintiff's property in the bill.

The trial was before *Stawell*, C. J., in Melbourne, on September 3rd, 1862.

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It appeared that *Stevens* was the son-in-law of *Wilson*, and often received assistance from him; that two years before the sequestration, *Stevens* had given to *Wilson* a warrant of attorney and bond for £1500; that judgment was never entered up on the warrant of attorney, but a writ was issued by *Wilson*, and by arrangement judgment was signed in the action. *Wilson's* own son, who acted as the agent of *Stevens*, pressed him on behalf of *Wilson* for payment; and in January, 1862, by dint of threats to put the sheriff in possession, and by great pressure, *Wilson* got certain payments in cash, and two bills of exchange. The proceeds of one of these bills the Plaintiff claimed in the present action.

As to the cash payments, as they were *bond fide* made, and were therefore valid by section 12 of the Act, no question arose about them. But as to the bills, the Plaintiff contended that the transfer of them was void under section 8 by the mere facts, that it was made within sixty days next preceding the sequestration, and that other then existing creditors were preferred by it. No question of fraud or intent was involved under section 8. If the transfer were void, he further contended that the proceeds of the bill, since received by *Wilson*, could be recovered from him under the count for money had and received to the Plaintiff's use, as assignee.

The Defendant answered that, on the construction lately put on section 8 of the Act by the Privy Council, in the case of *The Bank of Australasia v. Harris*, the transfer was not void, because it was not a fraudulent preference, but made *bond fide*, under pressure, like the cash payments. There was no direct proof of actual insolvency, or contemplated surrender, or known proceedings to sequester; but the Plaintiff gave evidence of an immense number of bills falling due against *Stevens*, and that he absconded just before they became due. It was therefore suggested for

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the Plaintiff to the jury that *Stevens* absconded to defeat or delay his creditors. But it was suggested for the Defendant that *Stevens* absconded to avoid charges then said to be impending, rather than to defeat or delay his creditors. One of the Defendant's witnesses, who "acted as *Stevens's* banker," swore to a belief that if *Stevens* had stayed he would have "pulled through his difficulties."

The learned Judge, in reference to the operation of 5 Vic., No. 17, sec. 8, directed the jury that the transfers of the bills must have been voluntary, but need not necessarily have been fraudulent—*i. e.* amounting to "a fraudulent preference," in order to bring it within that section; and told them that they must be satisfied *Stevens* was actually insolvent. The verdict was for the Defendant. In answer to a question specifically put, the jury found that the transfer was made by the insolvent *bonâ fide*. Leave was given to move the full Court to enter a verdict for the Plaintiff.

A rule *nisi* was obtained to enter the verdict for the Plaintiff, on the grounds that the transfer had the effect of a preference; and that the verdict was against evidence.

Higinbotham and *Harris* shewed cause.—There is no evidence that *Stevens* was then insolvent. According to *Laing v. The Bank of Victoria (1)*, the meaning of being insolvent is, not that you cannot make cash payments in full, but that your liabilities exceed your assets. If he were not then insolvent, there could be no other then existing creditors whom he could prefer, in the sense of the Act. But granting there were then existing creditors who could be preferred, there is nothing to shew that they have not been paid in full, and, therefore, that the Defendant was in fact preferred. There is, indeed, no proof that any creditors

ever proved on the estate. The case of the *Bank of Australasia v. Harris*, reported in a note to *Courtney v. Young-husband* (m), governs this case. It decides that the words of section 8, of the 5 *Vic.*, No. 17, "indicate a fraudulent preference, and were not intended to refer to any case of preference not fraudulent." The jury have expressly found that this transfer was not fraudulent but *bond fide*. It will be contended that that case is distinguished from this in the point, that the persons who raised the defence there were not the official assignees of the insolvent; but that point was not before the mind of the Court in its judgment; the circumstance is not once referred to.—[*Stowell*, C. J.—We have not the report of the argument; and the judgment states some of the grounds of determination, not all. The plea is said to be bad on demurrer. I know of no reason why a plea in the very words of the statute should be bad, except on the ground that the defence was raised by persons who had no right to raise it. *Molesworth*, J.—A case in this Court has decided that an alienation which was within the 6th section was only voidable, though that section says such alienations are fraudulent and absolutely void (n). I apprehend the law is the same under this section.] The case of *Young v. Billiter* (o), was trover under the 1st and 2nd *Vic.*, cap. cx., sec. 59, by the assignees of an insolvent who had, while in embarrassed circumstances, and within three months of imprisonment, given to a favored creditor a warrant of attorney, under which he entered up judgment and seized the goods. It was held in the House of Lords that, though the warrant of attorney was voidable as against the official assignee, yet he could not treat the selling as an act of conversion against himself; and it was doubted whether he had any remedy at law. Therefore, if

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(m) 1 W. & W., Law, 59.

(o) 30 L. J., Q. B., 153.

(n) *Vide Braithwaite v. Pascoe*,
5 *Shadforth*, 28; *McLachlan v.*
Wilson, *Id.* 53.

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the section be so read as to make the transfer in this case voidable only by the assignee, and by him only, it would follow that even he would be without remedy at law; at all events till some actual conversion had been done, or some demand and refusal made. And in that case, the warrant of attorney was given with intent to prefer.—[*Williams, J.*—Why, indeed, should the transfer be void as against all the world? What is the object of the “*Insolvent Act*,” except to protect the estate on behalf of the creditors? Why, therefore, make the transfer void, except so far as against them and the official assignee? The official assignee need not interfere unless he considers the estate damnified. *Stawell, C. J.*—The last sentence of the report in the case of *The Bank of Australasia v. Harris* shews that the point as to the official assignee was in the mind of their lordships—the words “nor does it indeed appear that any claim “has, under that sequestration, been made against either “the appellants or the respondents.” This report is from the *Jurist*. The report in the *Weekly Reporter* says that Mr. *Temple* and Mr. *Aspland*, counsel for the respondents, had, amongst other points, argued that “only the official assignee could avoid any payment or “transfer made in contravention of the provisions” of the 8th section.]—There was no other then existing creditor before whom the Defendant could obtain a preference, for there was no other judgment creditor. It should be left to the jury to say if the transfer had the effect of preferring one creditor to another.—[*Williams, J.*—If, however, you fritter away the strict letter of the 8th section, so far as to read the words “absolutely void” to mean only “voidable as against the official assignee,” why not go further, and say that the words “preferring any then “existing creditor,” mean fraudulently preferring?—To prefer there must be some one else in an equal position before whom the Defendant could be preferred. There was no other judgment creditor. The alienation must also be a voluntary alienation. Here it was compulsory.

Van-Casteel v. Booker (p), *Morgan v. Brundrett* (q). The 12th sec. makes certain payments illegal, unless made under legal pressure. That affords an inference that if the transfers which by section 8 are forbidden were made under pressure, then they also would be legal.—[*Williams, J.*—The section is an extraordinary one. We should consider its spirit and meaning, as well as its letter. If we may innovate in one respect on the strict letter, in favor of a liberal interpretation, why may we not in another, where a similar liberal construction seems desirable? No doubt we have always read this section differently. But if we have been wrong, it is never too late to mend. *Molesworth, J.*—A strong argument for the view we have hitherto taken has always appeared in the fact that, wherever the word “fraudulent” is used in the Act, it would appear to have been used, on an obvious and reasonable construction, in the sense of actual fraud.]

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Michie, Dawson, and Fellows in support of the rule.—There is a series of clauses in which the word “fraudulent” is constantly used, and then the eighth clause comes, and in reference to the series of acts of transfer there enumerated, the word is uniformly omitted; it must be because the Legislature meant, in that clause, to make the two circumstances there mentioned in themselves, and without reference to fraud, or to the intention with which such acts might have been done, effectual to defeat the acts mentioned in that section. If the estate turns out to have been solvent thereafter, no one is hurt; if it turns out that it was insolvent, the object has been secured of rightly setting aside the transfer in favor of the general body of creditors whom the transfer postponed to the favored one. *Armani v. Castrique* (r). The Act is clear that such alienations are absolutely void—and not merely voidable if the debtor were insolvent at the time of the alienation. The only difficulty about it is the

(p) 2 Exch., 691.

(q) 2 N. & M., 280; S.C., 5 B. & Ad., 289.

(r) 13 M. & W., 443.

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severity of it. The Act lays an iron grasp on the assets of every person insolvent, and, in doing so, runs a risk of seizing the property of persons who, though insolvent at the time, may afterwards become solvent. As to transfers in mortgage made by persons in embarrassed circumstances, who afterwards pull through, the simple course left for the creditors of such is to proceed on the assumption that their old security was worthless, and to take fresh securities, or take payment in cash when they can get it, and start again. The 12th section bears out this view. The first object is to secure the assets, and prevent alienations of the estate; but as a man's business must go on, some honest dealings for cash are protected; and payments made under pressure and *bonâ fide* are made valid. The same reason does not apply to assets not being cash, and alienations of these by persons insolvent within a certain distance of time from the sequestration, are made absolutely void. The case of *The Bank of Australasia v. Harris* does not decide this. The judgment says only—"The better opinion is," &c.; and then goes on to say: "but whether this be so or not," &c. So that the case was clearly not decided on that point. That decision can, indeed, be supported on other grounds. *Braithwaite v. Gardiner* (s). The decision of the Sydney Court has always been according to the Plaintiff's view.

Our. adv. vult.

1864.
 July 6.

STAWELL, C. J.—The judgment of the Privy Council in the case of *The Bank of Australasia v. Harris* bore so materially, it was said, on the proper construction of the 8th section of the 5th Vic., No. 17, that, although not essential to our decision, we felt justified in postponing it until a full report of the case had reached us.

There are, no doubt, passages in the judgment in that case which suggest that transfers, &c., in order to fall within that section must be fraudulent. But these observations, though entitled to the highest respect as serving to shew their Lordships' impression as to the proper construction of the section, are not necessarily to be considered as part of their judicial conclusion. The action in that case was by the indorsees against the acceptors of a bill of exchange. An alleged preference by the drawers of that bill to those indorsees afforded no answer whatsoever to the suit. The transfer of the bill, if void as a preference within the Act, should have been set aside by the official assignee of the drawer's estate; and there was no allegation or proof of his having deemed it incumbent on him to interfere. The defence was *res inter alios acta*. Moreover, if fraud is essential to render transfers void under this section, assignments made in pursuance of the 5th Vic., No. 9, sec. 37, are placed in a better position than the official assignee occupies under sequestrations in pursuance of the Act 5th Vic., No. 17—an Act passed in the same session. The former are protected by the retrospective effect of the sixty days' clause, which, exclusive of fraud, renders all transfers within that time void; whilst fraud is necessary to enable the official assignee to set aside a transfer executed within that period. We think this was not the intention of the Legislature.

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In the present case, the substantial defence submitted to the jury was that the transfer of the bill to the Defendant was not voluntary. It was extracted from the insolvent by threats of putting the sheriff into possession under a valid execution. Such a course would have been destructive of the insolvent's trade. His position—the prospect of his being able to meet the then existing pressure—the probability of his yielding in consequence of these threats—and of his defeating the levy by a voluntary sequestration, were all matters for a jury to

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consider in deciding whether the transfer was made voluntarily or not. The case went to them on this issue, and we think there was evidence to sustain the verdict returned.

Rule nisi discharged.

NOTE.—His Honor Mr. Justice *Molesworth*, who was not present at the delivery of the above judgment, has furnished the Reporters with the following memorandum in respect to it:—

“ This decision was given in my absence, and verbally
“ its language was not communicated to me. I concurred
“ in it upon the ground that the Defendant having an
“ execution could, by selling under it, have obtained the
“ same priority over other creditors as he did by the
“ transfer of the bill; that the insolvent's power to prevent
“ that result by voluntary sequestration was not to be
“ regarded. I thought that generally where an execution
“ is avoided by transfer, it should be a question for a jury
“ regarding the powers of the execution creditor, and the
“ circumstances of the transfer, to say whether the creditor
“ was, by the transfer, placed in a better position as to
“ obtaining payment before other creditors than he would
“ have held if the insolvent had remained passive.”

END OF TRINITY TERM.

IN THE MATTER OF THE REAL PROPERTY ACT;
AND IN THE MATTER OF THE APPLICATION OF
MARTIN LYONS.

[IN CHAMBERS (t).]

1864.

August 19.

NICHOLAS KEARNEY was the proprietor of land under "*The Real Property Act*" (v), being the Crown grantee of subdivisions A. and B. of section 33 in the County of Dalhousie. In November, 1863, he entered into a written agreement for the sale of this land to *Martin Lyons*. On November 30, at the request of *Martin Lyons*, he executed a power of attorney to *Charles Lyons*, in the form of Schedule I. to "*The Real Property Act*," authorising *Charles Lyons* to dispose of the land, and to do all acts necessary for completing the purchaser's title. This power was registered under the Act, and a transfer executed thereunder of the whole of the land to *Martin Lyons* on May 21, 1864, in the form in Schedule D. On June 22, *Martin Lyons* obtained the Crown grant from the Treasury on production of the transfer thus executed; and on the same day lodged both grant and transfer at the office of the Registrar-General, to procure himself to be registered as proprietor. On the same day a caveat was lodged on behalf of *James Joseph Kearney*, who thereby claimed a lien or equitable charge of £94 on the land in question, and forbad the registration of any instrument affecting it until after notice of any intended registered dealing to the caveator. The Commissioner of Titles thereupon refused to proceed in registering *Martin Lyons* as proprietor. On June 24, *Nicholas Kearney* executed a revocation under the

A caveat lodged under the 80th sec. of the "*Real Property Act*," claiming a lien on land for a sum specified, and forbidding the registration of any instrument affecting the land until after notice to the caveator, will not be extended to include a claim to the land absolutely, alleged by affidavit; and the person applying to be registered as proprietor may on summons to the caveator obtain an order from a Judge in Chambers for withdrawal of his caveat, upon payment to him of the sum therein specified.

(t) Coram *Barry, J.*

(v) No. 140.

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Act of the power of attorney to *C. Lyons*, and afterwards executed a transfer under the Act of all the land to *J. J. Kearney* the present caveator, who thereupon sought to be registered as the proprietor. Against this registration *M. Lyons*, the present applicant, lodged a caveat on July 6. On the same day *M. Lyons* tendered to the agent of *J. J. Kearney* the sum of £94. This tender was refused; *J. J. Kearney* asserting his title to the land absolutely. Under these circumstances *M. Lyons* obtained a summons, calling upon *J. J. Kearney* to shew cause why the caveat lodged by him should not be removed on the grounds—(1) that he ought not to have lodged it; (2) that the amount mentioned therein had been tendered and refused; (3) on the grounds appearing in the affidavit of *M. Lyons*; and why the Commissioner of Titles should not proceed with the application of *M. Lyons*.

This summons now came on to be heard in Chambers upon affidavits, from which it appeared that the land had been originally occupied by virtue of the invalid occupation licenses purporting to be granted under the Land Act of 1860; and that *N. Kearney*, the occupant, in exercise of the privilege conferred upon him as a licensee by the subsequent land Act of 1862, had become the purchaser of the land held under his license. *M. Lyons*, the present applicant, asserted that *N. Kearney* had occupied and purchased as a trustee for him. *J. J. Kearney*, the caveator, asserted that *N. Kearney* had occupied and purchased as a trustee for him; also that *N. Kearney* was of drunken habits, and had been induced to execute the contract of sale to *M. Lyons* and the power of attorney to *C. Lyons*, before referred to, whilst in a state of intoxication, and without understanding the effect of either transaction. The purchase-money for the land had been paid into the treasury by the caveator. The applicant was in possession; money had been spent by both in improvements upon the land.

J. W. Stephen for the applicant.—The land is already within the provisions of "*The Real Property Act*," as it was not alienated from the Crown until after that Act came into force. This application is, therefore, made under the 81st section, which relates to caveats affecting land already under the Act, the caveator having lodged a caveat in the form prescribed by the 80th section. The weight of evidence is in favor of the applicant, who is entitled to the land by virtue of the original trust in his favor, and also by virtue of subsequent contract with his trustee. The caveat asserting a lien for a specific sum cannot be amplified by the affidavits which have been filed into a more extensive claim by a proprietor; and, on payment of the sum alleged to be due, the caveat must be removed.

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Bunny for the caveator.—The positions of *cestui que trust* and purchaser are inconsistent, and discredit the applicant's evidence. It is clear upon the affidavits that the caveat which was prepared in the Registrar-General's office was not intended to have the limited operation contended for. There is no declaration of trust in the applicant's favor sufficient to satisfy the Statute of Frauds; nor is the alleged agreement for sale such as would be enforced by a court of equity in a suit for specific performance. *N. Kearney* was drunk when he signed it; and it does not appear that the purchase-money was ever paid.

J. W. Stephen in reply.

BARRY, J.—I shall not consider this matter with respect to the trust alleged on either side, which was in each instance opposed to the policy of the Land Acts, and resorted to for purposes of evasion. Trusts so constituted I cannot recognise. The case, then, resolves itself into an ordinary contract for sale, which contract is impeached by a person not a party to it, on the ground that when the vendor entered into it he was drunk. I do not consider

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that the evidence is sufficient to impeach the sale on that ground, even were it one which I could entertain; and I shall, therefore, order the removal of the caveat. As to the terms upon which it is to be withdrawn, I do not feel myself at liberty to extend the language of the caveat to embrace other claims to which it has no reference. It is admitted that the amount of the sum due to the caveator on account of purchase-money is correctly stated; and upon that sum being paid to him the caveat must be withdrawn and the registration of the applicant, as proprietor, proceeded with. This is not a case for giving costs to either party.

"On discharge of £94 by payment or tender to *J. J. Kearney* or his attorney, within two weeks, his caveat to be removed. The Commissioner of Titles is thereupon to register *M. Lyons* as proprietor. Reserve to *J. J. Kearney* any claim he may have to recover for money laid out in improvements on the land, and his equitable rights with respect thereto, if any."

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Victoria,

AT LAW.

IN

MICHAELMAS TERM, 28 VICTORIÆ.

The Judges who sat in Banc in this term were—

STAWELL, C. J.

WILLIAMS, J.

BARRY, J.

REGINA v. JOHN COOPER.

QUESTION of law reserved for the opinion of the Judges of the Supreme Court, under the Act 16 Vic., No. 7, sec. 28, by *Stawell*, C. J., on the trial of the prisoner for rape at the Maryborough Circuit Court. The point was stated thus:—

“The offence was alleged to have been committed on Tuesday, 21st June last, and on the 24th June the prosecutrix, a girl of twelve years old, complained to her mother, and also to another person; fear of punishment having deterred her from complaining (as she told the prisoner she would) at once. *Margaret Parker*, a witness, being sworn, stated, ‘The big one (the prosecutrix)

and where a witness stated the terms of the complaint, and in the complaint the prisoner was spoken of by name as the offender, a conviction following on such evidence was quashed.

1864.

September 1.

On an information for rape, witnesses called to corroborate the statement of the prosecutrix that she complained, can only be examined by counsel for the prosecution, as to whether complaint was made; and cannot be asked to state any detail of the complaint,

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“said *Jack Cooper* put me down and took out his thing
“and put it into me. I cried, but the prisoner told me
“not to cry out.’ Mr. *Ireland*, for the prisoner, objected
“that the person’s name ought not to be mentioned; that
“the whole story could not be received; and that the
“evidence should be confined to a simple statement—that
“she (the prosecutrix) had made a complaint. I admitted
“the evidence; it corroborated the testimony of the girl.
“The prisoner was found guilty, and sentenced, but execu-
“tion was respited until the opinion of the Judges, &c.

“W. F. STAWELL, C. J.

“29th July, 1864.”

C. A. Smyth for the Crown.—There has been no absolute decision that such evidence is admissible, but the feeling of the Judges seems to be in favor of it. *Reg. v. Eyre* (w). [*Williams*, J.—I always thought that only evidence of the fact of complaint at the time, to shew unwillingness, was admissible; not evidence of any details.]—That was the rule, but it seems to be doubted. In *Reg. v. Walker* (x), *Parke*, B., says that the sense of the thing is that the jury should know the nature of the complaint, that they may judge how far it is evidence corroborative of the prosecutrix’s statement that she complained; but that for reasons which he never could understand a rule has obtained of rejecting all the details. The whole facts were admitted in a case tried by *Byles*, J.—[*Williams*, J.—It does not appear that the evidence was admitted in *Reg. v. Eyre*. There was no opportunity of carrying the case to an appeal there.]—The case of *Reg. v. Megson* (y) shews the distinction in such cases between evidence as independent hearsay testimony and as corroborative original testimony. See also Mr. *Fitzjames Stephen* on “*Criminal Law*,” citing *Reg. v. Folkes*.

(w) 2 Fost. & Fin., 578.

(x) 2 Moo. & Rob., 212.

(y) 9 Car. & P., 420.

[*Stawell*, C. J.—I cannot think Mr. Baron *Parks* would ever have made such an observation as this reported of him. It seems to me wholly against the rules of evidence. And with all deference to Mr. Justice *Byles* I cannot understand the reasoning ascribed to him.]

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No appearance for the prisoner.

Fellows, as *am. cur.*, handed up *Reg. v. Osborne* (z).

STAWELL, C. J.—In this case the prisoner was charged with rape on a girl over twelve and not thirteen years of age. She was called and gave evidence. She was asked if she complained at the time, and answered “Yes, to my mother and my aunt.” Her aunt was called to corroborate her as to her having complained; and she did not merely state that the girl had complained, but gave the words of the complaint; and in those words the prisoner was spoken of by name as committing the offence. Counsel for the prosecution contended that he was entitled to have the whole details of the complaint, and not merely the fact of a complaint. The principle on which such evidence is receivable is this:—For the completion of the offence it is necessary that the woman or girl should be an unwilling party. Some proof of that is her being a complaining party; and corroborative proof by the party complained to, that the prosecutrix did so complain is admissible. So far all is consistent with the plain rule of evidence excluding hearsay evidence, because evidence is not admitted as hearsay proof of the facts mentioned in the complaint, but as original evidence of the fact of the complaint itself. But one step further than that, the evidence becomes but hearsay proof of the details mentioned in the evidence. The prisoner himself may cross-examine as to such details, in order to shake the credibility of the witnesses. He

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takes that course at his own risk, for he may thereby render admissible evidence of facts which would not otherwise be received. But it would be violating first principles if such a line of examination were permitted on behalf of the prosecutor.

BARRY, J.—The principles governing this case are simple, and their application obvious. That the child made a complaint ought plainly to be received as evidence, not of the matters which she relates, but of the fact that she stated an injury had been inflicted on her. Such evidence then given is admissible to test the sincerity of her present statement. But for that purpose all that can be asked the witness giving corroborative evidence as to her statements is, "Did the child make complaint to you at such and such a time?" The child or the witness may indeed be cross-examined in detail to test his or her veracity, but that is only the privilege of cross-examination, and the same liberty cannot be permitted to the prosecution.

WILLIAMS, J.—After the child has told her story, she is asked did she complain? She says "Yes, to my mother, my father, my sister, brother," or other person. Then such mother, or sister, or other person is called, and may be asked, "Is it true that she did complain, as she swears?" The witness says "Yes, she did complain." That is corroborative of the child's statement, and corroborative evidence that she is now speaking the truth when she says she was an unwilling party. That is the extent to which the prosecution may go, at least so the law has always been read by me. That is the rule hitherto laid down. That is the old rule and the safe one, and I am not prepared to hold otherwise till that has been clearly overruled by the English Judges.

Conviction quashed.

REGINA v. AH POCK.

1864.

September 1.

QUESTION of law reserved, under the Act 16 *Vic.*, No. 7, sec. 28, for the opinion of the Judges of the Supreme Court, on the trial of the prisoner at the Circuit Court of Sandhurst. The point was stated thus:—

The words in the 11 and 12 *Vic.*, cap. xlii., sec. 17, “or so ill as not to be able to travel,” include the case of a woman sworn by her husband to be suffering from no other disease than her approaching confinement, but to be not in a fit state to travel, on account solely of such approaching confinement; and a conviction supported by the depositions of such an absent woman was affirmed by the Court.

“The deposition of a witness was tendered under 11 and 12 *Vic.*, cap. xlii., sec. 17 (a), the following proof having been given:—*Thomas Craven*, sworn—‘My wife’s name is *Isabella*. She is ill. She is not able to travel. She has been ill for three weeks. The depositions produced are signed by her, and also by *Mr. Willoby*, the police magistrate. *Mr. Willoby* committed the prisoner for trial. My wife and the other witnesses were cross-examined.’ Cross-examined—‘My wife is unwell. She is near her confinement. She is suffering from no other disease than her approaching confinement.’ Re-examined—‘*Dr. Carkeet* is in attendance on my wife. My wife was willing to come if she was in a fit state to travel.’ *Mr. Helm*, for the prisoner, objected that the approaching confinement of the witness was not an illness within the meaning of the statute, and that the deposition was not admissible in evidence. I admitted the evidence. The prisoner was found guilty and sentenced, and execution was respited till the opinion of the Judges,” &c.

C. A. Smyth, for the Crown, cited *Reg. v. Stevenson* (b).

No appearance for the prisoner.

The COURT held the deposition to be admissible.

Conviction affirmed.

(a) *Ad.*, 804.

(b) 9 *Cox*, C.C., 156.

1864.

Sept. 1, 8.

Three recent English cases considered, and held not inconsistent with *In re Garrard*. 2 Wy. & W., Law 229.

IN RE GEORGE GARRARD.

J. W. STEPHEN mentioned the refusal of application for the admission of Mr. *Garrard* as an attorney, &c., in Michaelmas Term last (c), and asked leave to hand up to the Bench three recent English cases on the subject. He made no motion. The cases were—*Ex parte Smith* (d), *Ex parte Mills* (e), and *Ex parte Duncan* (f).

STAWELL, C. J.—We will look at those cases.

Cur. adv. vult.

September 8.

STAWELL, C. J.—On the first day of term Mr. *Stephen* called our attention to three cases recently decided in the courts in England, bearing upon the application of a gentleman who sought admission as an attorney, but whose service was considered insufficient, inasmuch as the greater part of it had been given whilst under articles in a branch establishment, and removed from supervision of the master to whom he was articulated. It was said that these cases would justify the Court in taking a different view of the case to that which they took some year or so ago, when the application was first made, and opposed on behalf of the Law Institute. Now, in one of the three cases to which we were referred, the applicant was refused admission expressly on the very grounds which we assigned at the time the application was first made. In the other two, the applicants were admitted. But one of these persons, *Duncan*, had acted as clerk eighteen years before his articles of clerkship began, and during twelve of those eighteen years he was managing; so that, although he had abstained from entering into articles for so many years, he certainly had attended to

(c) 2 Wy. & W. Law, 229.

(d) 12 W. R., 752.

(e) 10 L. T., 337.

(f) 4 New Rep., 97.

his profession for a sufficiently long period to enable him to become thoroughly acquainted with its duties. In the other case, that of *Mills*, the applicant had served ten years, and had shewn himself thoroughly conversant with the business of the profession before articles were entered upon. In the present case—even giving the applicant full credit for the statements in all his affidavits—it appears that the applicant passed a matriculation examination at Oxford in 1852; that he came out here soon afterwards; that he became a clerk in an attorney's office in 1854; and that he so continued until February, 1857. In April, 1857, he became clerk to his present masters, Messrs. *Muttlebury* and *Malleeson*, and in August, 1858, he was articled. Therefore the utmost time that he served or acted as clerk in an attorney's office before he entered into articles was four years. After examining all the facts we see no grounds whatever, from these cases, for altering the decision we have already expressed.

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In re
GARRARD.

WOOLCOTT v. WISEWOULD.

RULE nisi to review taxation of the Plaintiff's costs of a reference and award.

Sept. 1, 8.

The Plaintiff, an attorney's clerk, sued for salary; and the Defendant, an attorney, pleaded a set-off for a delivered bill of costs. There was a submission to arbitration, and one of the terms was—"Costs of action reference and award "to abide the event of the award." The arbitrator awarded a "balance" to the Plaintiff, deeming a certain portion of

An attorney's clerk sued for salary, and the attorney pleaded a set-off for a delivered bill of costs. The action was referred to arbitration, and one of the terms of the reference was "costs of

action, reference and award to abide the event of the award." The arbitrator awarded a "balance" to the Plaintiff, after giving the Defendant a credit on account of his set-off. The prothonotary, in taxing costs, held that although the Defendant had succeeded on his plea of set-off, yet the Plaintiff by obtaining an award for "a balance," had obtained "the event of the award," and was entitled to costs. On rule nisi to review taxation,

Held, that the prothonotary was right, and rule nisi discharged.

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the Plaintiff's claim, and also a certain portion of the Defendant's set-off, proved. On such award the Prothonotary gave the Plaintiff costs, holding that "the event of the award" was in the Plaintiff's favor.

Fellows for the rule.

Billing and *Dawson* against the rule.

The authorities cited were: For the Plaintiff—*Hemsworth v. Bryant* (g), *Reynolds v. Harris* (h), *Bayles v. Brown* (j), *Anonymous* (k), *Boodle v. Davis* (l), *Matlock Gas Coy. v. Peters* (m). For the Defendant—*Chittenden v. Walker* (n), *Gribble v. Buchanan* (o), *Marsack v. Webber* (p), *Highgate Archway Coy. v. Nash* (q).

Cur. adv. vult.

September 8.

STAWELL, C. J.—This was an application to review the taxation of an attorney's bill of costs. An action had been brought, and the cause and all matters in difference were referred to arbitration. No other matters were in dispute between the parties beyond those comprised within the cause itself. It was therefore the cause alone which was in fact referred. The plea of set-off had been pleaded in the action. The arbitrators entered upon their duties, and they found that the Plaintiff was indebted to the Defendant in a certain sum, and that the Defendant was indebted to the Plaintiff in a larger sum; they gave the Defendant credit for the amount of his set-off, and they found a balance due to the Plaintiff. In the submission to

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| (g) 1 C. B., 131. | (m) 6 Ell. & Bl., 215. |
| (h) 3 C. B., N.S., 267. | (n) 3 A. & E., 691. |
| (j) Sup. Ct. Vic., recently, in
Chambers, before <i>Williams</i> , J. | (o) 18 C. B., 691. |
| (k) 1 Smith, 426. | (p) 29 L. J., Q. B., 109. |
| (l) 3 A. & E., 200. | (q) 2 B. & Ald., 597. |

reference there was no direction as to how the verdict should be entered. The cause was substantially referred to the arbitrators, and the costs of the reference and award were to abide the event of the award.

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On the application, an objection was taken on behalf of the Plaintiff that the objection now raised—that neither side was entitled to costs—was not substantially taken before the taxing officer. We think it was. We think it is sufficient if the taxing officer is fairly apprised of the objection, and that the objection need not be worded so technically as pleadings are drawn. Both sides, as well as the officer, were aware of the objection, and a case on which the Defendant now relies was cited and brought before the officer himself.

The question, therefore, is, whether, in this instance, the Defendant's contention was right—whether, inasmuch as the cause had been referred to arbitration, and as the Plaintiff succeeded only in part, he is entitled to no costs—or whether, if the Plaintiff is considered entitled to any costs, the costs of the reference can be distributed. There can be no doubt whatsoever that when a cause and all matters of difference are referred to arbitration, to entitle either side to succeed he must succeed not only in the cause but on all points of difference. The arbitrators need not find on each issue separately; therefore there is no way of distributing the costs; and the costs fall to the ground, inasmuch as substantial justice cannot be done. If the other party is successful on the other matters, those may outweigh in importance the matters in the cause; and it would be unjust to allow a party who was only partially successful to obtain all the costs, and not to permit the opposite side to deduct the costs on those points on which he had been just as successful as the other. But, as it appears to me, the present matter is governed by decisions which shew that though it may be otherwise when a cause and all other matters in difference are referred, yet when a cause only is referred, the

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costs being directed to abide the event, the award then is substantially the event of the action, and is equivalent to a verdict. The case *Boodle v. Davies* was cited; but that, instead of being in favor of the Defendant, I think is directly against him. Mr. Justice *Patteson* is distinct in his ruling that when a cause only is referred the award amounts to a verdict. The case of *Jones v. Jones (r)* is by implication a clear authority. There the facts were as nearly analagous to the present case as one can well imagine. The action was for goods sold and delivered; a set-off was pleaded, the Defendant succeeded in reducing the Plaintiff's claim by a considerable sum, and the case was referred to arbitration, the costs to abide the event of the award.

An objection has also been taken that, inasmuch as the action was commenced on the "*County Court Act*," and the Plaintiff did not recover the amount prescribed by that Act, he was entitled to no costs. But if the present objection be right, there is no occasion to go into the question of the "*County Court Act*," because, according to the Defendant's contention, he was not entitled to costs, as he did not succeed on all the issues, although he succeeded so far as to be entitled to a decision. The same principle is recognised in *Reynolds v. Harris*.

So far as I can gather, the decisions are all one way, and against the view taken by the Defendant. The taxing officer, we think, was perfectly correct in the view which he took. The rule must be discharged; and with costs, as we think the officer right.

Rule discharged with costs.

BELFAST ROAD BOARD, APPELLANTS, *v.* KNOX,
RESPONDENT.

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Sept. 2, 8.

APPEAL from the County Court. The road board had struck a rate, and applied to *Knox* for the sum due from him as a ratepayer. The rate had been properly struck, but *Knox* contended that in his assessment certain pasture land, on which a lower assessment was proper, was treated as arable land, on which a higher rate was proper. *Knox* paid the whole demand under protest, and brought an action in the County Court for the excess due from him, as money had and received to his use, and reserved judgment. The road board brought this appeal.

Mackay for the Appellants.

Fellows for the Respondent.

The authorities cited were *Shaw v. Woodcock* (*s*), *Reg. v. The Justices of Middlesex* (*t*), *Reg. v. The Justices of Shrewsbury* (*v*), *Reg. v. Uttoxeter* (*w*), *Rex. v. The Mayor of Leeds* (*x*), *Glynn v. Thomas* (*y*), *Gulliver v. Cozens* (*z*), *Gay v. Matthews* (*a*).

The *B. Road Board* demanded payment of a road rate from *K*. It was admitted that the rate was regularly struck, but contended that *K*'s assessment was too high, some pasture having erroneously been rated as arable. *K*. paid the whole demand under protest, and brought an action in the County Court for the excess as for money had and received. On appeal,

Held, (1) that *K*. could not have quashed the rate on *certiorari*, nor have replevied for

Cur. adv. vult.

the excess paid under protest, (2) That *K*. was bound to tender the amount really due, and might after such tender have brought his action if a distress were issued for any excess beyond the sum really due and tendered. (3) That "money had and received" did not lie in such a case, as the validity of a rate could not be inquired into in such an action. (4) That as money had and received did not lie the judgment was erroneous, and the appeal must be allowed.

- (*s*) 7 B. & C. 78.
- (*t*) 9 A. & E., 540.
- (*v*) 2 Str., 975.
- (*w*) *Id.*, 932.
- (*x*) 4 Q. B., 796.

- (*y*) 1 Ex., 870; 25 L. J., Ex., 127.
- (*z*) 1 C. B., 788.
- (*a*) 32 L. J., Mag. Cas., 58.

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STAWELL, C. J.—In this case the road board had made application to *Knox* for a certain rate. The rate had been properly struck, but *Knox* contended that, in his assessment, the road board had treated certain pasture land as arable land. The money was paid under protest, and then *Knox* brought an action in the County Court to recover this money as “money had and received.”

The Defendants—the present Appellants—contended that an action for money had and received would not lie, and that the proper course would have been to quash the rate by *certiorari*, or to replevy; or, if neither of these things could have been done, to tender the amount to which the Plaintiff considered himself actually liable, and then bring an action, either for replevin or trespass, as he might have been advised.

The cases cited by the Appellants themselves shew, however, that *certiorari* would not lie. It is a very questionable point indeed whether *certiorari* would lie to quash a rate. The two cases referred to in *Strange, Rex. v. Uttoxeter* and *Rex. v. The Justices of Shrewsbury*, are directly against it. Whatever doubt there may be as to *certiorari* lying, there can be no doubt whatever that in order to maintain it, assuming it to lie, the objection must appear on the face of the rate itself. But the rate was perfectly good on the face of it. Then as to replevin. Replevin would lie if goods or beasts were improperly taken in the nature of a distress; but the Plaintiff in replevin must necessarily fail if any portion of the amount claimed be due. It appears that part of the sum claimed was due.

The case, therefore, seems to resolve itself into this—was the ratepayer bound to tender the precise amount, or was the rate-collector bound to demand the precise amount? If it is not obligatory on the ratepayer to tender the amount due, he is left without redress except by the

present action. The case of *Glyn v. Thomas* seems, if not expressly, at all events impliedly, to say that the ratepayer is the person who ought to pay, and ought to tender. It is said that the board were in error, inasmuch as they demanded more than was due; but the observation made in the course of the argument on the case is entitled to great force—namely, that the person whose rates are in arrear, or the tenant whose rent is in arrear, is the person first in default. The debtor is bound to pay. The ratepayer contended that more was demanded than was really due. Now it was incumbent upon him to tender the amount which was really due, and, if a distress then issued for the excess, he might bring his action.

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No doubt difficulties may arise, because there may possibly be other cases in which the knowledge of the precise amount due may be within the province not so much of the ratepayer as of the road board. But not only must the actual rate struck be submitted to the surveyor-general, but the precise amount of rate demanded must be posted up at a particular place. In addition to that, the rate is first struck at a meeting of ratepayers and householders. Therefore, although the knowledge may be as much within the province of a particular board as within that of a ratepayer, yet the ratepayer is never without the means of ascertaining the precise sum due. I do not see that there can be any substantial injury inflicted by a rule that a ratepayer should in all cases tender the amount.

But apart from this, there is another objection to the proceedings in the Court below: Can the validity of a rate be inquired into in an action for money had and received? Inconvenience, to say the least, must arise from such a course. Parties do not come to try an issue of that nature. If a distress had issued, replevin would have followed, and then the issue could easily have been known and readily inquired into. But in an action for money had and received,

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to inquire into a rate the precise objections to which are not accurately known, would lead to great inconvenience. In allowing such an action to be brought it would necessarily be assumed that such an inquiry could be instituted. I draw no distinction between the County Court and this Court in that respect. My objection is, that the parties cannot be prepared to try the real question at issue. The Defendant is perfectly ignorant, or may be so, of the objections which it is intended to raise to the rate. We therefore say that the judgment was erroneous—that the action for money had and received cannot lie—and that the appeal must be allowed.

Appeal allowed.

Sept. 2, 8.

A municipal corporation had power to permit miners to mine upon and under the public streets within the corporate boundary, subject to conditions and restrictions for the public safety such as the corporation might think fit to impose. The corporation granted such permission, subject to conditions and restrictions such as it thought fit. The miners after mining left their excavations in the streets in a condition such that water-pipes burst, and a chasm was made, into which a person, without neglect, drove his horse, and suffered damage and loss. The owner of the horse brought his action against the corporation, and recovered damages. On rule *nisi* for a nonsuit, and on demurrer, both argued together,

BADENHOP v. THE MAYOR &c., OF SANDHURST.

DEMURRER to plea, and rule *nisi* for nonsuit.

Declaration: "For that the Defendants permitted certain persons to mine and make excavations for mining purposes in and upon a certain public highway known as the High-street within the boundaries of the said borough under the Defendants' control And although it was the duty of the Defendants to impose all proper conditions and restrictions with a due regard to the public safety upon the persons so permitted to mine upon a public highway and to cause all such excavations to be filled in at the close of such mining

impose. The corporation granted such permission, subject to conditions and restrictions such as it thought fit. The miners after mining left their excavations in the streets in a condition such that water-pipes burst, and a chasm was made, into which a person, without neglect, drove his horse, and suffered damage and loss. The owner of the horse brought his action against the corporation, and recovered damages. On rule *nisi* for a nonsuit, and on demurrer, both argued together,

Held, that the power to grant permission to mine did not absolve the corporation from the responsibility cast on them as managers of the public streets to take care that those streets were preserved in good order; that the corporation was liable; and that the Plaintiff's pleadings and verdict must be sustained.

"operations without damage or injury to any waterpipe
 "being under such highway Yet the Defendants permitted
 "and suffered the said excavations to be so carelessly and
 "improperly filled in that a certain water-pipe being under
 "the said highway was injured and damaged and burst by
 "means whereof the escape of the said pipe washed away
 "the said soil of the said highway and formed a hole
 "therein which hole being left unlighted unwatched and
 "unfenced a certain horse and carriage of the Plaintiff
 "with which he was passing in the night time along the
 "said highway fell into the said hole whereby the said
 "carriage was broken and the said horse injured and rendered worthless to the Plaintiff and the Plaintiff expended
 "a large sum of money in endeavoring to cure the said
 "horse Damages £49."

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Third plea.—"The said persons in the said declaration
 "mentioned were the holders of miners' rights and the
 "Defendants permitted them to mine upon and under the
 "said street the same being under the care and management of the Defendants and the Defendants permitted
 "the said persons so to mine subject to certain conditions
 "and restrictions which to the Defendants seemed fit."

Demurrer to third plea.

Plaintiff's points were, *inter alia*—" (1.) The 18th section
 "of the Act No. 148 which authorises Defendants to permit mining on public streets subject to such restrictions
 "and limitations as they shall think fit does not confer
 "the absolute power of determining what restrictions and
 "limitations are necessary and proper but where an injury
 "has been sustained in consequence of such permission to
 "mine it is incumbent on the Defendants to shew they had
 "used all the reasonable and necessary precaution to avoid
 "the occurrence of such injury. (3.) As the declaration
 "alleges facts which but for the passing of the Act No.

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"148 would have amounted to a public nuisance for which
 "the Defendants would have been liable to indictment the
 "Defendants were responsible for all injuries caused by the
 "consequences of mining operations after their termination.
 "(4.) The words restrictions and limitations do not mean
 "merely written or verbal conditions Therefore it is
 "immaterial whether the Defendants did or did not impose
 "proper or any restrictions or limitations The words imply
 "the exercise of all due care and control over mining
 "operations on public roads necessary to insure the public
 "safety The want of such care in not causing the excava-
 "tions on a public road to be properly filled up at the
 "termination of such mining operations is the breach of
 "the duty of the Defendants complained of."

Defendants' points were:—" (1) The 18th section of
 "No. 148 authorised Defendants to permit the holder of
 "miner's right to mine upon and under the street men-
 "tioned in the declaration subject to such conditions and
 "restrictions as they might think fit and therefore it was
 "not necessary to allege that the conditions and restric-
 "tions were necessary and sufficient for the public safety.
 "(2) Any mining upon a public street is to some extent
 "dangerous to the public and the legislature in authorising
 "mining in public streets must have contemplated that the
 "safety of the public might be endangered. (3) The decla-
 "ration does not state that the Defendants themselves
 "mined or made excavations in the street or authorised
 "or employed the said persons to mine upon the street.
 "(4) It means merely that Defendants did not prevent the
 "said persons from mining in the street An action will
 "not lie against Defendants merely because they did not
 "take steps to prevent the mining. (5) The declaration
 "does not allege that Defendants did not impose proper
 "conditions or restrictions and it is inconsistent therewith
 "that such conditions and restrictions were imposed but
 "that the said persons neglected to comply with them.

"(6) The Act No. 148 does not require that Defendants "should have caused the excavations to be filled up. (7) As "the said persons are not alleged to have been the servants "of the Defendants they are not responsible for the negligent "manner in which the said persons mined and made excavations. (8) The declaration does not shew that Defendants "could have prevented the said persons from carelessly and "improperly filling in the said excavations."

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The action was tried on circuit, and the verdict was for the Plaintiff. A rule *nisi* was obtained for the Defendants to enter a nonsuit. By arrangement the arguments on the Plaintiff's demurrer and on the Defendants' rule *nisi* were taken together.

Martley for the demurrer, and against the rule.

Wood against the demurrer, and for the rule.

The authorities cited were *Hole v. Sittingbourne and Sheerness Railway Company* (b), *Southampton and Itchen Bridge Company v. Local Board of Health* (c), *Grieve v. Mayor, &c., of Melbourne* (d), *Overton v. Freeman* (e), *Knight v. Fox* (f), and *Ellis v. The Sheffield Gas Company* (g).

Our. ado. vult.

STAWELL, C. J.—This was an action to recover damages for injuries sustained by a horse in consequence of having fallen into a hole in one of the public streets of Sandhurst. It appears that the borough council, under the authority of

September 8.

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| (b) 6 H. & N., 488; and 30 L. J., Ex., 81. | L. J., C. P., 52. |
| (c) 8 Ell. & Bl., 801. | (f) 5 Ex., 721. |
| (d) <i>Ante</i> p. 95. | (g) 9 Ex., 702; and 23 L. J., Ex., 205. |
| (e) 11 C. B., 867; and 21 | |

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the Act No. 148, sec. 18, had allowed certain persons, holders of miners' rights, to mine under a road or street. That power had been held by the Board of Land and Works, and this Act transferred it to those local bodies who had the care, custody, and management of streets. It is unnecessary to determine whether the words "It shall be lawful" in this case are mandatory on these particular bodies. If mandatory, the local bodies are protected by the conditions and restrictions which they are authorised to impose in such manner as they think fit. At the trial a nonsuit was moved for on the grounds that the mayor and corporation were not liable, that the miners were the persons whose negligence had caused the injury, and that the action should have been brought against them, and not against the corporation. To one of the pleas a demurrer was filed, and the point involved in the demurrer is similar to that in the nonsuit. The declaration itself has been drawn as if the action were based on the omission of the corporation to frame suitable regulations. I do not hesitate to say that that to a very great extent misled me at the trial, and distracted the attention of the Court from the point really at issue, which is this—the corporation are entrusted with the management of these streets, and they are permitted to suffer certain persons to mine under these streets, subject to certain conditions and restrictions which they may think fit to impose. Does the permission they are thus allowed to grant absolve them in any way from the responsibility cast upon them as managers of the public streets to take care that those streets are preserved in good order? The declaration, instead of being framed in the mode in which it was, might have been a simple action for negligence. The fact of these miners having been allowed to undermine or work the streets was a matter to have been brought forward, not by the Plaintiff but by the Defendants, if they could substantiate it as a ground of defence. Those cases in which the persons employed, and not the employers, are held responsible,

are where the injury arises from the negligence of the persons who do the thing, and not from the thing itself. Thus, in the present case, if the miners had raised up an embankment in the street, instead of leaving the mine completely unprotected, and if an injury had arisen in consequence, the injury would have been caused by the acts of the persons doing the thing. In this case, however, the injury was caused by the thing itself—that is to say, by the mine. Ground was removed, and the bursting of a waterpipe followed. There is a certain apparent conflict between the cases on this point, but the distinction is obvious enough. In *Knight v. Fox and Overton v. Freeman*, the men employed were considered answerable; and in *Ellis v. The Sheffield Gas Company* and *Hole v. The Sittingbourne Railway Company* the employers were held answerable. The distinction I draw is, that if the injury arises from the collateral negligence of the persons employed, they, and not the employers, are liable, unless the employers actually interfere. But irrespective of the question of collateral negligence, an important point is that of the nuisance arising from the act done. In the case of *Ellis v. The Sheffield Gas Company* a nuisance was caused by the opening of the streets for the purpose of laying down pipes, and the employers were held responsible, because it was obligatory on them to see that the nuisance was as slight as possible. So in the case of *Hole v. The Sittingbourne Railway Company*. The company were authorised to build a bridge over a river. The building of the bridge was an impediment to the navigation, and a nuisance. It was obligatory on the company to see that the bridge was built in as short a time as possible, and in such a way as not to cause a nuisance. The bridge was improperly built, and fell down. This was attributed to the negligence of the sub-contractor—yet the company were held answerable. In the present case there was a nuisance, and it was incumbent on the Defendants to see that the persons whom they allowed to commit the nuisance limited it to the narrowest

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extent possible. I do not think the Defendants were absolved from the original liability imposed upon them of seeing the streets kept in proper order. The work had been going on two months before the accident happened. It was not for the Defendants to say that they were not to interfere with the miners, more than it was for a merchant to say that he could not interfere with a person who put up a teakle in front of his warehouse, although that teakle broke two months afterwards and killed a passer by. I think, therefore, the action is properly maintained. The rule for a nonsuit must be discharged; and, on the demurrer, judgment must be given for the Plaintiff.

Rule nisi discharged. Demurrer allowed.

April 5.
September 8.

THURLOW AND ANOTHER v. PERKS AND ANOTHER.

In ejectment by *T.* and *H.* against *P.* and another the Plaintiffs proved a Crown grant to *C. W.*, but no devolution of any estate from *C. W.* to the Plaintiffs; acts of seisin of the Plaintiff *T.*, and assurances from the Plaintiff *T.* to the Plaintiff *H.* On rule nisi for nonsuit,

EJECTMENT. The Plaintiffs were *John William Thurlow* and *Francis Hodgson*. At the trial they proved a Crown grant to *Charles Williams* in 1840, but no conveyance from *Williams*; possession by *Thurlow* in 1842; and subsequent assurances by *Thurlow* to *Hodgson*. It was contended for the Defendants that Plaintiffs defeated their own title by proving a Crown grant to *Williams*, and no subsequent devolution of the legal estate from him to the Plaintiffs. The verdict was for the Plaintiffs, and leave was given to move. A rule nisi was obtained to enter a nonsuit generally.

Ireland, Q.C., and *Harris*, for the Plaintiff, shewed cause.

Held, that inconsistency not multiplicity forms the test by which a Plaintiff's several modes of proof may or may not be deemed admissible; that the grant to *W.* was not inconsistent with the presumption of seisin arising from the evidence of *T.*'s possession; and that the rule nisi for a nonsuit must be discharged.

Wood for the rule.

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The authorities referred to were—*Davis v. Gent* (h), *Jayne v. Price* (j), *Smith v. Stapleton* (k), *Doe d. Morris v. Williams* (l), *Nepean v. Doe* (m), *Smith v. Lloyd* (n), *Keyse v. Powell* (o), *Doe d. Batten v. Murless* (p), *Cartwright v. Cowper* (q), and *De Beavoir v. Owen* (r).

Cur. adv. vult.

STAWELL, C. J.—The Plaintiffs attempted to deduce title from *Charles Williams*. They proved a grant, dated 26th August, 1840, from the Crown to him, but, failing to give evidence of any conveyance from him, they relied on possession as evidence of title. The exercise of various acts of ownership by the Plaintiff *Thurlow*, in 1842—the sale by *Thurlow* to *Joseph Hodgson*, in 1843—a gift by him to the Plaintiff *Hodgson*, in the same year—and a conveyance by *Thurlow* to the Plaintiff *Hodgson*, in 1862, were all proved. The Defendants contend that the Plaintiffs have not shewn their right to recover in the action.

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The failure of the Plaintiffs to deduce title from *Williams* does not, in our opinion, preclude their establishing seisin in *Thurlow* by evidence of possession only. An outstanding estate presents a bar to a Plaintiff in ejectment, if that estate is carved out of the fee on which the Plaintiff relies, or is inconsistent with his right to immediate possession; but in the present case the grant to *Williams* is not inconsistent with the presumption of seisin, arising from the evidence of *Thurlow's* possession. A grant may have issued to *Williams*, and yet *Thurlow* may by possession—a posses-

- (h) 26 L. J., Ex., 122.
- (j) 5 Taunt., 326.
- (k) Plowd., 434.
- (l) 6 B. & C., 41.
- (m) 2 S. L. Cas., 433.

- (n) 9 Ex., 562.
- (o) 2 Ell. & Bl., 182.
- (p) 6 M. & Sel., 110.
- (q) 4 T. R., 547.
- (r) 5 Ex., 166.

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sion not opposed to *Williams's* title—have established a possessory right to the land.

A Plaintiff having failed in one line of proof, may have recourse to another not opposed to the first, and may succeed by the second notwithstanding his imperfect proof of the first. Thus in an action on a bill of exchange, proof of notice of dishonor may be insufficient, and yet the Plaintiff may succeed by evidence of a promise to pay the amount made by the Defendant with full knowledge of the circumstance. Inconsistency, not multiplicity, forms the test by which several modes of proving the Plaintiff's case may or may not be deemed admissible.

We need not determine whether *Williams's* right has been barred by the Statute of Limitations. The Plaintiff may abandon the title through *Williams*, and rely on another not inconsistent with it. Was the evidence of possession, then, adduced at the trial sufficient to go to the jury? Possession affords *prima facie* evidence of seisin. In the present case the person so seised sold to a stranger, and by his direction subsequently conveyed to one of the Plaintiffs. No question of adverse possession arises; for although neither of the Plaintiffs is proved to have been in possession subsequently to 1843, there is no evidence of how or when the Defendants became possessed. They are spoken of as trustees, but no proof whatever of title was offered on their behalf.

The case may be resolved into evidence of the seisin of one Plaintiff, *Thurlow*—a conveyance in fee by him to the other Plaintiff, *Hodgson*—no rule of law to prevent such evidence being sent to the jury, and no proof of the title of the Defendants. We see no reason to disturb the verdict returned for the Plaintiffs on such a state of facts.

Rule nisi discharged.

JENKYNs v. ELSDON.

April 4, 5.
September 8.

TRESPASS for assault and imprisonment. The Plaintiff was a workman acting under the direction of the municipal authorities of Emerald Hill in their assertion of a right to make some construction on or over the land of the Melbourne and Hobson's Bay Railway Company for the better enjoyment of a public road over the railway which the municipality asserted to have been legally and effectively proclaimed by the Government. The Defendant was the engineer of the Railway Company, contesting for his company the claims of the municipality. In the course of the contest the Defendant arrested the Plaintiff, and took him before a magistrate in Melbourne. The Plaintiff brought his action for the arrest and imprisonment, as illegal.

Under the "Melbourne and Hobson's Bay Railway Company's Act," 16 Vic., sec. 68, authorising any officer or agent of the company to seize and detain an offender until he can be conveniently taken before "some Justice of the Peace in the district or place wherein such offence

shall be committed," it is sufficient if the offender be taken before a Justice of the Peace having jurisdiction in and for the district or place in which the offence has been committed, and it is not essential that the nearest magistrate should adjudicate.

In the "*Management of Railways Act*," sec. 31, enacting that an officer of the company may seize and detain an offender whose name and residence shall be unknown to such officer, and give him in charge to a police constable, who shall without warrant convey him with all convenient despatch before a justice, the object of the section is to enable the officer to arrest a transient offender whose name and residence the officer does not possess the means of ascertaining. If information on which the officer ought to act is offered, his declining so to act, with the means of knowledge at hand, will not leave the offender's name and residence "unknown" to the officer. In each case the jury must decide whether the information offered to the officer before the arrest is sufficient or not. The officer must at his own risk arrest a person whose name and residence he had the means of knowing.

A Crown grant to a railway company was made "subject to the trusts, conditions, uses, and provisos hereinafter contained." One of the provisos thereafter contained was as follows:—"Provided nevertheless and we do hereby reserve unto us, our heirs, &c., all mines of coal and such parts or so much of the said land as may hereafter be required for making public ways, canals, railroads, sewers or drains in over and through the same to be set out by our Governor for the time being of our said Colony of Victoria, or some person by him authorised in that respect." The Governor by proclamation set out a public right-of-way across the railway. The company arrested a person for using the right-of-way. The person arrested brought trespass against the company, setting up the right-of-way by his replication, and he obtained a verdict. On rule nisi for nonsuit,

Held, that the reservation was good, and the verdict right.

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The Defendant pleaded (i.) not guilty, (ii.) a justification under the Company's Act (s), (iii.) a justification under the "*Management of Railways Act*" (t). The Plaintiff took issue on these pleas, and also replied to them specially, a right-of-way reserved to the Crown in the Company's grant (v) and duly proclaimed.

* The verdict was for the Plaintiff, damages £10. A rule nisi was obtained for the Defendant to enter a nonsuit.

Dawson, Moore and Holroyd shewed cause.

Michie, Q.C., J. W. Stephen, Wood and Fellows for the rule.

(s) 16 Vic., s. 63

(t) No. 186, s. 31.

(v) The Crown grant was unto the Melbourne and Hobson's Bay Company, "subject to the trusts, conditions, uses, and provisoes hereinafter contained." "All," &c., [the parcels] "To hold the same to the said Melbourne and Hobson's Bay Railway Company forever, upon trust for making and maintaining a railway between the city of Melbourne and Hobson's Bay, and the construction of wharves, jetties, and other necessary erections for the purpose of enabling ships and vessels to load and discharge their cargoes, and land and take in their passengers from and to such railway, and for the purposes and in conformity with the provisions of the aforesaid Act, subject to the right of purchase by Us or on Our behalf contained in the said Act, and for no other purpose whatsoever. Provided nevertheless, and We do hereby reserve unto Us, Our heirs and

"successors, all mines of coal and such parts or so much of the said land as may hereafter be required for making public ways, canals, railroads, sewers, or drains in over and through the same to be set out by Our Governor for the time being of Our said colony of Victoria, or some person by him authorised in that respect. And We do hereby further reserve unto Us, Our heirs and successors the right of full and free ingress, egress and regress, into, out of, and upon the said land for the several purposes aforesaid. Provided nevertheless, and We do hereby expressly declare that this Our royal grant is and shall be subject to the conditions hereinafter mentioned, that is to say—That if the Hobson's Bay Railway Company shall be dissolved, or by any means become and be no longer existent, or if the said pieces or parcels of land hereby granted, or any parts thereof, shall at any time hereafter have

The points argued were whether either justification pleaded by the Defendant was supported by evidence; and whether the right-of-way set up by the Plaintiff had been duly reserved by the Crown grant.

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The authorities cited were—*Blackwall v. England* (w), *Mackay v. Osborne* (x), *Attorney-General v. Municipal Council of Emerald Hill* (y), *Davis v. Hardy* (z), *Brown v. Goldsmith* (a), *Stuteley v. Butler* (b), *Kenson v. Reading* (c), *Arden v. Darcey* (d), *Wilson v. Armourer* (e), *Rowbottom v. Wilson* (f), *Smart v. Morton* (g), *Durham and Sunderland Railway Coy. v. Walker* (h), 2 *Lord Raymond*, 1093, *Com. Dig. Tit. Fuit*; *Shep. Touchst.*, 79,80; *Co. Litt.* 47a 143a.

Our. adv. vult.

STAWELL, C. J., read the following reserved judgment:— September 8.

Trespass for assault and imprisonment. Pleas—Not guilty; a justification under section 63 of the Act 16 *Victoria*, incorporating the Melbourne and Hobson's Bay

"ceased by the space of three
"months to be maintained or
"used as or for such railway, or
"in connection therewith, or have
"been for and during such space
"used or applied to any other
"purpose whatsoever than as and
"for a railway as aforesaid, or in
"connection therewith, or shall
"be alienated or attempted to be
"alienated in fee simple or for
"any less estate or interest to any
"person or persons whatsoever by
"the said Melbourne and Hobson's
"Bay Railway Company save and
"except in pursuance of the
"powers and authorities now
"vested in the Hobson's Bay
"Railway Company, under and by

"virtue, or in pursuance of any
"Act of the Lieutenant-Governor
"and Legislative Council of the
"said colony of Victoria, now or
"hereafter in force within this
"colony it shall be lawful," &c.
[Power of re-entry.]

(w) 8 Ell. & Bl., 541.

(x) Sup. Ct. Vic.

(y) Sup. Ct. Vic.

(z) 6 B. & Cr., 225.

(a) Hob., 108.

(b) *Id.*, 174.

(c) Cro. Eliz., 244.

(d) Lane, 69.

(e) 8 Salk, 157.

(f) 3 Ho. Lo. Cas., 348.

(g) 5 Ell. & Bl., 30.

(h) 2 Q. B., 940.

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Railway Company; and also a justification under section 31 of 27 *Victoria*, No. 186.

Issues were taken on the pleas of justification, and to each a further replication of a right of way. The assault and imprisonment were proved, and a verdict returned for the Plaintiff.

The replications of a right of way, founded on a reservation contained in a deed of grant from the Crown to the Hobson's Bay Railway Company, form the material questions in the action; and on the alleged failure by the Plaintiff to sustain them, the present rule was obtained. We must first determine, however, whether there was evidence to support either of the pleas of justification.

As regards the first, the requirements of the 63rd section are, in our opinion, complied with if the person arrested is taken before a justice of the peace having jurisdiction in and for the district or place in which the offence has been committed. There is no provision expressly requiring the person arrested to be taken to the nearest magistrate, nor any reason for extending the words "in the district or place" beyond their plain meaning. It is not essential, therefore, that the nearest magistrate should adjudicate. If any special injury be caused by the person charged having been conveyed an unreasonable distance, there would, no doubt, be some remedy for such a course; but in the present case no such course has been pursued, and no such question arises.

As regards the last plea of justification, the words of the Act 27 *Vic.*, No. 186, section 31, do not, in our opinion, require that the name and residence of the trespasser should be known personally by the officer before arrest. Inconveniences, to say the least, if not absurdities, would result from so very literal a construction of the section. The

officer may be personally acquainted with the trespasser—know him intimately, and have known his former residence; that residence may have been changed, and at the moment the officer may not know its precise position; but a true and accurate description of it may have been given to him. He may believe it to be correct; and yet, according to the construction contended for by the Defendant, such a trespasser may be arrested as one whose name and residence were unknown. The object of the clause was, in our opinion, to enable the officer to arrest a “transient trespasser,” as described in the margin, whose name and residence were unknown to him, that is, whose name and residence he did not then possess the means of ascertaining; for if information on which the officer ought to have acted was offered, we cannot think his declining so to act would, with the means of knowledge at hand, leave the name and residence unknown to him. We think that, in each case, the jury must decide whether the information afforded at any time before the arrest is sufficient or not; and the officer must, at his own risk, arrest a person whose name and residence he had the means of knowing. There was evidence, in our opinion, to go to the jury in support of one, if not both, pleas of justification.

It is incumbent on us, therefore, to consider the replications of a right of way. In order to promote the making of railways in the country, the Crown of its special grace, by its deed-poll, granted to the Melbourne and Hobson's Bay Railway Company, subject to the trusts, conditions, reservations, and provisos thereafter contained, a piece of land upon trust for making and maintaining a railway. The deed of grant contained a proviso for reservation by the Crown of all mines of coal, and such parts and so much of the land as might thereafter be required for making public ways, canals, railroads, sewers or drains, &c., to be set out by the Governor for the time being. A reference to the reservations, &c., is made before the *habendum*. The company

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took the land subject to them. Such a reservation as that mentioned is not only not unusual, but in all deeds of grant of Crown lands situate in localities where any necessity exists for it, is almost uniformly inserted. It is so inserted for the benefit of the public, and only to be used where the public requirements need it; and the ways, &c., are to be set out by the Governor. There can be no doubt of the meaning of this proviso in the deed of grant, or of the intention of both the Crown and the grantee. The question, therefore, is, whether this obvious intention has been carried out by words sufficiently apt to prevent any rule of law defeating it. The case for the Defendant has on this point been argued as if the clause were a reservation or exception, and as if, being void in part or as regards one subject matter, it were necessarily void altogether, and as regards all its objects. We think the proviso so far as it relates to mines of coal is a reservation. As no objection has been taken to this part, it is almost unnecessary to add that it seems to us to be valid. The subsequent portion of the proviso includes several and distinct subjects—ways, canals, railroads, sewers and drains—and objections may be made to reservation respecting one which are inapplicable to the others. As regards canals, for instance, the reservation of part of the land itself may perhaps be necessary, and such a reservation or exception it has been said is void as being repugnant to the grant. We are by no means of opinion that this last objection is tenable. The case of *Lord v. The Commissioners of Sydney* (j), to which we were referred, seems a distinct authority that in a deed of grant, if some out of a larger number of acres are reserved at the election of the Crown if required for public purposes, “these acres” are not to be granted by the grantee to the Crown, but “are provisionally saved out of the grant to him.” Whether any sound distinction can be drawn between that case and the present is comparatively immaterial; for, conceding that in the case of canals a reservation of land is necessary to

(j) 12 Moore P.C.C. 500.

give it effect, and that such a reservation is void on the ground of repugnancy, in the case of rights of way no reservation of any of the land itself is needed, and to them the objection is inapplicable. We think the proviso should be read distributively, and as if consisting of several separate and distinct reservations respecting each particular object, and that no sufficient reason has been assigned why the whole should be rejected in consequence of a fault existing only in a part, or why one vicious portion should invalidate the remainder. We are not called upon, therefore, to decide on the validity or invalidity of any other portion of this proviso than the reservation "of required public ways to be set out by the Governor, or some authorised person," that being the only part which relates to the present action. According to the case of the *Durham and Sunderland Railway Company v. Walker*, a reservation in a popular sense of a right of way is not, legally speaking, a reservation, but a new grant of an easement. No special form of words, however, is necessary for such a grant—*Roudbottom v. Wilson*. The company have entered and enjoyed the advantages of the Crown grant, and although it is in the form of a deed-poll it may operate as a grant of an easement by the grantee—*ibid.*, 355. The ways are to be set out and the *termini* fixed by the Crown—specially appointed by the deed of grant for that purpose.

No objection has been taken to the form of proclamation or setting out adopted in this instance. No reasonable doubt can arise, therefore, that the clause, whether as a reservation or grant, is valid to the extent of giving a right of way to Her Majesty personally, her heirs and successors. Is, then, the user of this way limited to the Crown, or does it, as the reservation purports, extend to the public, for whose behoof expressly the clause was inserted, and for whom, so far as relates to these lands, the Crown may be regarded as standing in the position of a trustee? A reservation of rent to a stranger, as between subject and

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subject, is void as a rent, although good as a reservation of a sum in gross—*Vin. Abridgment*, tit. 'Reservation' (D) (7) but it seems that the King may reserve rent to a stranger, and that such a reservation of rent is valid—*ibid.*, 8; *Co. Litt.* 143 (b); 2 *Rolle's Abridgement*, 447, 425. No reason is assigned for this exception. The argument of necessity or inconvenience is applicable with at least as much force to the case of reserving a right of way for the use of a third person described in the deed as to that of reserving rent to a stranger. If the Crown may reserve rent to a stranger, by parity of reasoning the Crown may also grant land subject to the grantee giving an easement over it to strangers—that is to say, to the public. The proviso does not contain the grant of a right of way to the Crown, but reserves to the Crown the power to set out a public way. Why, then, should that which is given in express terms for the use of the public be limited to the use of the Crown? The reservation of a right of way to the Crown, to be used by the Crown only, would, in this country at least, be a useless form; but the enabling the Crown to set out a public way, where it was a matter of public necessity, would insure the grantee against any undue exercise of the privilege, and yet retain for the public an advantage without which the land would not have been granted to the company. The form in the present grant is that adopted for years in this and the adjacent colony—it has never, so far as we know, been previously questioned. No authority has been cited in favor of the limited construction in the case of a Crown grant contended for by the Defendant, and we think it is opposed to the sound reading of the deed. The Plaintiff's replications have, in our opinion, been sustained.

Rule nisi discharged.

REGINA v. DALLIMORE AND OTHERS.

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June 23, 24.

July 4, 5.

September 7.

EJECTMENT to recover possession of Crown land which once formed part of a pastoral run called Lamplough occupied by the Defendants under license from the Crown; which was proclaimed part of a gold fields common; which was then subtracted from the gold fields common by proclamation; and which thereupon was claimed on the one hand by the Crown freed from the rights both of the Defendants and the commoners, and on the other hand by the Defendants as reverting to its position of a part of Lamplough run. The Crown put up the land to auction as "new runs." It was purchased by *Bowles* and *Noonan*. The Crown guaranteed quiet possession to *Bowles* and *Noonan*. *Dallimore* had taken possession, and he impounded the stock of *Bowles* and *Noonan*. The Crown then brought the present action to recover possession. The verdict was for the Crown, with leave for the Defendants to move the Court.

The pastoral run, called Lamplough run, was long before, and in the year 1861, occupied by *D.* under licence from the Crown. By proclamation, dated 28th January, 1861, a part of Lamplough run was proclaimed a gold-field's common. No reduction of *D.*'s assessment or licence-fee was made. By proclamation, dated 26th October, 1863, the gold-

field's common was abolished, and a new gold-field's common proclaimed, which consisted of the middle third part only of the original gold-field's common. *D.*, the former pastoral licensee, claimed the other two-third parts of the gold-field's common, which were no longer part of any gold-field's common. The Crown claimed the same lands as reverting to it freed from the rights both of the licensee (*D.*) and the commoners. The Crown put up the pasturage of the disputed lands to auction as "new runs," and it was purchased by *B.* and *N.* But *D.* had remained in possession alone, or with the commoners, and had paid his licence-fee up to the end of 1863, and he impounded the stock of *B.* and *N.* The Crown brought ejectment against *D.* and obtained a verdict. On motion to enter a nonsuit,

Held, that under No. 117, sec. 71, on the proclamation of a gold-field's common over land occupied by a pastoral tenant of the Crown, the rights of the tenant and commoners might co-exist; that under No. 117, secs. 80, 107, and 121, yearly licences might be issued as theretofore, might be revoked for any of the objects specified in the 80th section, and until so revoked would continue until the end of the year 1870; that the Crown had no right to treat these disputed lands as unoccupied runs to be dealt with under section 98, as such a dealing with them was not for one of the specified objects; and that as the licence of *D.* could not have been and had not been revoked, the Crown must fail in this ejectment. Rule for nonsuit therefore made absolute.

Seemle, that the district surveyor is not an authorised agent to make a demand for the Crown, of possession of Crown lands.

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A rule *nisi* was obtained by the Defendants to set aside the verdict and enter one for the Defendants on the grounds—(1) The right of entry was not in the Crown, but in *Bowles* and *Noonan*. (2) The proclamation of the common did not determine the possession of the Defendants; or if it did, the revocation of such proclamation vested the possession in the former licensee (3) The Crown had no power under "*The Land Act 1862*," section 98, to dispose of the land to *Bowles* and *Noonan*. (4) No demand of possession was proved—the demand itself having been insufficient, and no authority to make it being proved. (5) As licenses to occupy the run from 1847 to 1863 continuously, and particularly for the year 1861, were issued, the Land Act, No. 117, section 71, did not apply to the Lamplough run, but only to unoccupied Crown lands; or, if it did so apply, the licensee was as much entitled to occupy the land as the commoners. (6) The order in Council of 9th March, 1847, coupled with possession and payment of licence-fees, assessment, and rent, and recognition from time to time by the Crown and its officers, established a tenancy, and such tenancy has not been determined.

Higinbotham, A. G., *Billing*, and *Moore*, shewed cause.—*Bowles* and *Noonan* have no interest at all—not even a licence, as yet; and if they had a licence, they have not a sufficient interest to be Plaintiffs in ejectment. *Cole on Ejectment*, 66; *Goodright v. Swynmer* (*k*); *Platt on Leases*, 22; *Bloxam's Case* (*l*). Defendants had not possession of the land at the date of the proclamation of the lands as a gold-field's common; but if they had, their possession was determined by it. This results from a comparison of the Acts No. 117 and No. 145, and from the context of the various sections of the latter Act. The point, too, was expressly determined by Mr. Justice *Molesworth* on the

(*k*) *Kenyon's Rep.*, 385.

(*l*) *Sup. Court N.S.W.*, March, 1849.

motion for an injunction. See also *In re Olow* (m). There is no provision in the Act No. 145 for rent being imposed after one year; therefore, what Defendants contend for is equivalent to a claim to have the land in future years for nothing. Admitting, for argument's sake, that the Crown had no power to dispose of the land to *Bowles* and *Noonan*, the objection is profitless to the Defendants, for it shews that the land remains in the Crown. The Crown relies on the proclamation and demand. The proclamation determined the occupancy, and a demand was unnecessary—No. 145, Secs. 122, 123, 127; and *Gazette*, January 5, 1864. But if a demand were necessary here, it was made, and well made *Turner v. Bennett* (n). Moreover, putting *Bowles* and *Noonan* in possession, or the attempt to do so, was a sufficient demand from *Dallimore*. The Act 117, section 71, applies to any Crown lands. The evidence at the trial shewed that there was no payment of rent which could enure to make a tenancy from year to year.

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Ireland, Q.C., *Wood*, *Fellows*, and *C. A. Smyth* for the rule.
—Occupants of Crown lands for pastoral purposes under the Orders in Council of 1847, and the legislation since then, have not been "licensees," in the ordinary legal sense of that term, holding no interest or estate in the land, but a mere privilege or permission in reference to it—nor even holders of so low an interest or estate in the eye of the law as that of a mere "tenant at will," or "tenant by sufferance;" but have always held a *quasi* estate for a "term of years," not to extend beyond a certain limit designated by the Act 145; or, at least, an estate "from year to year," not to exceed the same limit. Under the Orders in Council, and the laws following them, the holder of the license was entitled to cultivate his land within certain limits, and take from it cultivated crops. He was entitled to a "lease" for fourteen years; not more than one-fourth of his land could be taken from him to be "sold" and he had a right of pre-emption.

(m) 1 Wy. & W., Law 43.

(n) 9 M. & W., 643.

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Under the latest legislation, the Governor is bound to issue to him a yearly license "as heretofore," until a future year named, on his payment of a consideration named; and he is not to be deprived of his land for any but certain purposes named. How is it possible to say that the interest of such a person is that of a mere tenant at will? And how is it possible to argue thence that when his occupation has been interfered with legally, but only temporarily, for one of the purposes named in the Act, it is thereby terminated for ever, and that the Crown is thenceforward in a position to deal with his land as if he had never had any rights over it at all, and to put his land to a use which before such temporary and legal interference with his possession would have been illegal and impossible, and which both then would have been, and now will be, in flagrant violation of the whole spirit of all the legislation on the subject?

There were also cited—*Ex parte Bryant* (o), and *Bac. Ab. Tit. Common*.

The COURT called the attention of the Attorney-General to a point which he had not had an opportunity of fully meeting—arising out of the omission of the Crown to terminate the tenancy-at-will of *Bowles* and *Noonan* before bringing this action.

The Attorney-General met the point by *Reg. v. Bloxham* (p), in which it was decided by the Supreme Court of New South Wales that unless Crown lands are actually alienated the Crown is never out of possession in law, though out of possession in fact.

Ireland, Q.C., referred to *Woodfull's Landlord and Tenant*, 194.

Our. adv. vult.

(o) Sup. Ct. N.S.W., lately.

(p) Sup. Ct. N.S.W., March, 1849.

STAWELL, C. J., now read the judgment of the Court:—

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September 7.

Ejectment to recover Crown lands forming part of a run in the unsettled district known as Lamplough. The facts of the case material to the question at issue are briefly as follow:—In 1861, and for several years previously, the Defendants or their predecessors had been in licensed occupation of Lamplough. In that year, by a proclamation dated the 28th January, and gazetted on the 6th February, part of Lamplough was proclaimed as a gold-field's common. No reduction in the assessment or license fee was made in consequence of this proclamation. In 1863, by a second proclamation, dated the 26th October, and gazetted on the 3rd November, this common, consisting of three blocks of land, was abolished, and a new common was duly proclaimed. One of these blocks formed the new common; the remaining two, which were separate one from the other, were not included in the second proclamation, and are the land now sought to be recovered. On the 31st December, the right to depasture stock on these blocks as unoccupied runs, was put up to auction under "*The Land Act 1862*," sec. 98, and two persons became the successful competitors one for each block. The Defendants continued in occupation from 1861 up to the commencement of the present action, in the same way as they or their predecessors had been previously to the first proclamation; rent or license fee was regularly paid up to the end of 1863. No proof was given or question raised respecting either the payment or nonpayment of the license fee or rent for 1864. No license had been issued for 1863. On the 30th of March, 1864, possession was demanded from the Defendants, and an attempt was made to place in possession the purchasers of the right to depasture. The action was commenced in April, 1864.

On this state of facts, the Defendants contended that the tenancy created by their occupation and payment of fees,

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had continued as regards these two blocks, that it had not been duly determined, and that the present action therefore could not be maintained. By the enactment 24 *Vic.*, No. 117, sec. 71, under which the first proclamation issued, the Governor in Council is empowered to proclaim Crown lands in the vicinity of a gold-field as a gold-field's common, and by the 77th section, to diminish, alter, or abolish such common; no reference whatever is made to the licensed occupant. It is probable that in many instances the necessity for a common may cease; the gold mines in some particular locality may become exhausted, and the population attracted by their discovery may leave that part of the country, and the common may be abolished. There is no provision in this Act that the license fee should be reduced on the common being proclaimed, or increased on its being abolished; but as at the time the Act was passed an assessment on the stock depastured was paid, and no other license fee demanded, such a reduction or increase may perhaps have been deemed unnecessary. Nor is there any provision guarding against the pastoral tenant surcharging with his beasts the land proclaimed as a common, to the injury of the commoners. This surcharge, however, is an abuse which may or may not exist, the existence of which we are not to presume, and for which, if it existed, there may be redress. The rights of the tenant and commoners may co-exist. The possession of the tenant may continue without diminishing the advantages granted to the commoners. The enactment may be strictly complied with—no violence done to any clause—no part rendered unnecessary or inoperative, and yet the tenancy of the licensee need not be determined. There are no words destructive of his tenure—no power given to extinguish it—and, as a general rule, rights conferred by an Act of the Legislature are not to be taken away, save by express enactment. The mere omission to provide against a possible abuse, affords no sufficient ground, in our opinion, for making the present case an exception to this general rule. We are not called on to

decide what redress the commoners may have were the commons surcharged by the beasts of the pastoral tenant. We merely construe the sections in question according to the general and sound rule of construction. The necessity for inserting the prohibitory negative words contained in the proviso to the 71st section of "*The Land Act 1862*," confirms our opinion; and the fact that the Government deemed it incumbent on them to make a formal demand of possession in 1864, shews that, in their opinion, the tenancy over these blocks was then subsisting.

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We think that, notwithstanding the first proclamation, the tenancy continued as theretofore over the land comprised in the common. It only remains for us to consider whether, according to the evidence, that tenancy has been duly determined. The circumstance of no licence having been issued does not affect the question; apart from money having been received and a receipt given for the amount as rent for Lamplough, the tenant remained in possession, and was ready to perform, or did perform, his part; and the fact that the Government did not comply with the directions of an act of Parliament cannot deprive that tenant of the right which he possessed. "*The Land Act 1862*," was passed on the 18th June in that year. It confers on the Government all the powers they now possess relating to the sale and occupation of Crown lands; its requirements must therefore be complied with or any dealing with these lands would be unauthorised. By that Act, the Orders in Council, and all regulations respecting the sale or disposal of waste lands of the Crown, were repealed. No rights were saved, and by the 80th section, it was enacted that the Governor should, in the same manner as theretofore, issue to the persons in the licensed occupation of runs, &c., yearly licences to occupy such runs for pastoral purposes, &c., but no such licences should be deemed to prevent such run, &c., from being sold or leased, proclaimed a common, or occupied by virtue

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of miners' rights or licences for other than pastoral purposes, or otherwise dealt with under the authority of that or any other Act. A proviso was added that no such licence should be in force after the 31st of December, 1870. The 107th section declares the interest in a run shall be deemed to be a chattel interest, and the 121st, that no occupier of land for pastoral purposes shall be entitled to any compensation by reason of that Act being thereafter repealed or altered.

We think that under these clauses yearly licences may be issued as heretofore—may be revoked for any of the objects specified in the 80th section, but for none other; and that, until so revoked, they are to be continued until the end of the year 1870. By this construction, full force is given to the whole of the 80th and 121st sections; the enumeration and proviso in the former, and the necessity for inserting the latter, cannot be disregarded. The object of these clauses seems to have been that the occupants should be permitted to continue in possession of their runs up to a certain date unless in the meantime they were required for any of the specified objects, when the tenancy was to be at once determined without the occupants being entitled to any compensation, save as regards certain improvements in certain cases. That object has been expressed in terms sufficiently distinct to leave, in our opinion, no doubt as to the proper construction. It has been assumed that these blocks might have been treated as unoccupied runs, and dealt with under the 98th section. Such an assumption we think was erroneous. The sale of the right to occupy for pastoral purposes attempted in December, 1868, was not authorised. Such a sale is not one of the specified objects—the licence is for a certain period, and for a valuable consideration; and, as we have already stated, the tenancy under it must be determined by the Government only as empowered by the Act. 15 *Viner's Ab.*, Tit. "Licence," (B) (C) (E). We

offer no opinion as to cases of alleged forfeiture from non-payment of rent or other causes.

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It is scarcely necessary, according to our view, to decide as to the demand of possession made on the part of the Government, but we think the district surveyor was not an authorised agent to make such a demand. The action cannot, in our opinion, be maintained.

Rule absolute.

IN THE MATTER OF THE APPLICATION OF
CHARLES ACTON GOSLETT
TO BE ADMITTED AS A BARRISTER.

September 14.

HIGINBOTHAM, A. G., moved the admission to the bar of Victoria of *Charles Acton Goslett*.—The affidavit states that Mr. *Goslett* has not been engaged in any "trade or business" for three years. But Mr. *Goslett* informs me that he has been for three months of the three years in the civil service as clerical assistant of the accountant of the Victorian Railways. [*Stawell*, C. J.—Has the point been raised before?] I am not aware that it has; but there are instances of the admission to the bar of several gentlemen who served a considerable portion of

Rule 9 of cap. II. of the *Supreme Court Rules* requiring that every person applying to be admitted to practice as a barrister, "must not be engaged in trade or business," during the next three years preceding the time

he submits himself to be examined, strictly speaking excludes a candidate who during one period of three months in the three years next preceding submission to examination had been clerical assistant of the accountant of the Victorian railways; but the question being newly raised, the applicant having treated the Court with candour, and members of the Court being under a misunderstanding somewhat pledged, the Court admitted the candidate specially under the exceptional circumstances, forbidding the case to be regarded as a precedent.

Per Stawell, C. J.—There is a marked distinction in the rule 9 of cap. II. of the *Supreme Court Rules* between the word "trade," and the word "business," and those who take on themselves the responsibility of making declarations, putting their own interpretation on the rules, must, if they afterwards discover themselves wrong, take the consequences of so acting.

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their time in the civil service. [*Barry, J.*—Is there any difference in principle between the public service and a private service?] I am not aware that there is; but a person engaged on salary, and not in trade would not be open to objection under the ninth rule. [*Stawell, C. J.*—Then a grocer's clerk might be admitted? *Barry, J.*—Who has been employed in that office for three years down to yesterday. *Stawell, C. J.*—And who has never had anything higher to do than the weighing of tea and sugar. *Barry, J.*—If the thin end of the wedge be once inserted, and if it receive the approval of the Court, there is nothing to prevent indefinite extension. A gentleman may be engaged for the three years in any occupation, public or private. The intention of the rule is, that for the three years he should be completely isolated from trade, so that he should not be prevented from being properly fitted for his profession. This is necessary both for educational and social reasons.]

The Court deliberated.

STAWELL, C. J.—We consider that this gentleman deserves credit for his candour; but we think it better that the application should be postponed for three months.

Higinbotham, A. G., later in the morning said he had been further instructed that the applicant had been in the Government service for the time already mentioned; but the opportunities enjoyed by the applicant had exceeded the requisite three years by some four months.

The Court directed that the applicant should make an additional declaration of the facts, so that the whole of them should appear on the proceedings filed. If that were done at any time during the day it would be sufficient, and the Attorney-General need not attend to renew the application.

Molesworth (for the Attorney-General) in the afternoon handed in a declaration intended to meet the desire of the Court.

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The COURT, on perusing it, found it consistent with the possibility that the service in Government employment had taken place, not, as supposed by the Judges from what had been stated by the Attorney-General, in the first four months of study, but in the succeeding three years next preceding the application for examination. On inquiry, the Court learned through counsel that this was the fact. Some deliberation followed the discovery.

STAWELL, C. J.—The object of the rules is to secure the attention of the student continuously and without interruption to his studies for three years; and the more effectually to ensure that result, to remove him from following trade or business during those three years. Strictly speaking, the facts now brought before the Court do not comply with the rules; but we think that this gentleman is entitled to the most favourable consideration of the Court—considering the candid way in which the whole circumstances have been laid before us—and that he may be admitted. If, however, the case were to be regarded in future as a precedent in any way, we should be allowing the rules to be frittered away. It has been determined on its own peculiar circumstances alone. There is a feature of these declarations requiring some animadversion—they draw no distinction between “trade” and “business.” There is a marked distinction between them. It by no means follows that a person occupied in business is engaged in trade. Those who take on themselves the responsibility of making declarations putting their own interpretation on the rules, must, if they afterwards discover themselves wrong, take the consequences of so acting.

BARRY, J.—I am of the same opinion. I desire also to

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state that this case is not to be drawn into a precedent, but regarded as coming before us under rather unusual circumstances, and as decided solely on its peculiarities entirely. I confess that I apprehended, on the statement made earlier in the day, that this employment in the civil service was not during the three years next before the application, but during the three months before that period, and I partly pledged myself to accept this additional declaration when it should come. It now appears that the service was during the three years. It is quite apparent that the rule requires the student to be continuously during these three years in his studies, and removed from a trade or business. This is obvious from the proviso at the end of the rule. [His Honor read the proviso, enabling a dispensation with a portion of the three years in cases of illness, &c.] That shews that the period of probation, where no such special circumstances intervene and become the ground of a special dispensation, is to be continuous and uninterrupted, and that any departure from that requirement forms an objection to the admission.

WILLIAMS, J., concurred.

*Admission specially granted under
the exceptional circumstances.*

HARKER v. BARWICK.

REPLEVIN for goods distrained in satisfaction of rent. Avowry by Defendant as agent of the landlord. At the trial it appeared that the landlord was a mortgagee; that the Defendant acted as his agent and gave a warrant to the bailiff; but that the Defendant himself had no warrant from the landlord. The verdict was for the Defendant. Pursuant to leave reserved a rule *nisi* for a nonsuit was obtained.

Fellows shewed cause.

Martley for the rule.

Reference was made to "*The Distress Act*" (q), *Reg. v. Leicester* (r), and 2 *Dwarris* on Statutes, 611.

Cur. adv. vult.

STAWELL, C. J.—This was an action of replevin, in which a rule *nisi* had been obtained to enter a verdict for the Plaintiff pursuant to leave reserved. There were two grounds mentioned in the rule, but the main objection raised upon the trial was, that the distress levied by the Defendant, who avowed as agent of the landlord, was not valid. The Defendant himself had delivered a warrant to the bailiff, but there was no warrant to him by the landlord; and the Plaintiff relied on the negative words used in the 1st section of "*The Distress Act*."

(q) 15 Vic., No. 4.

(r) 7 B. & C., 12.

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In replevin by *H.* against *B.*, the latter under his avowry as agent of the landlord, proved a warrant by himself to the bailiff, but did not prove any warrant by the landlord to himself. After verdict for Defendant on a rule *nisi* to enter a verdict for Plaintiff, *Held*, that notwithstanding the negative form of the words of "*The Distress Act*," 15 Vic., No. 4, sec. 1, the seizure was valid, and the avowry and the verdict good.

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In this instance it is not sufficient to look at that section alone, but the whole enactment must be considered to ascertain whether the words used are negative in form or in substance. There are four sections on the subject. The 1st describes the warrant which it is necessary should be given by the landlord; the 2nd provides that a copy of such warrant shall be given to the tenant; the 3rd provides that an inventory of what is seized, and a bill of charges, shall be given to the tenant; and the 4th requires that the bailiff shall give the tenant notice of the removal of the goods, if removed for sale. All these clauses relate to the same common object of protecting the tenant. The 9th section imposes a penalty if any of these requisites is not complied with, apparently drawing no distinction between them, one from the other. The mere circumstance, therefore, that in some sections affirmative words are used and in another negative does not decide the question. In the case referred to of *Gimbart v. Pelah* (s), much stronger words, negative in form, were held not to be negative in substance. There the Defendant justified a seizure of cattle *damage feasant*; yet he was not held to be a trespasser. So here the bailiff may have rendered himself liable to a penalty, but the seizure was not invalid, and the avowry was good, and the verdict for the Defendant must stand.

Rule nisi discharged.

COHEN AND ANOTHER v. CLEVE AND ANOTHER.

1864.

September 26.

DEMURRER by one of two Defendants to the fifth breach in a declaration.

The action was by *Samuel Cohen* and *Philip Cohen* against *Salé Cleve* and *Daniel Cleve*. The Defendants severed in their pleadings.

The material parts of the declaration ran thus:—
 "For that on the 15th February, 1864, it was
 "mutually agreed between the Plaintiffs and the
 "Defendants that the Defendants should deliver to the
 "Plaintiffs, and that the Plaintiffs should accept from the
 "Defendants and pay them for forty-five half-tierces of
 "*Barrett's* anchor-brand twist tobacco, *ex* a certain ship,
 "called the *Roxburgh Castle*, to arrive, at the price of 5s.
 "per pound in bond all round, the tobacco to be taken as it
 "was at the time of the said agreement, the Plaintiffs to
 "bear all risks; the weight and tare to be taken as filed by
 "the Customs department; the Defendants to hand to the
 "Plaintiffs a policy of insurance upon the goods against the
 "said risks, with particular average effected by the Defen-
 "dants with the Australasian Insurance Company; one-
 "half of the price to be paid by the Plaintiffs' acceptance

Declaration that *Cohen* and another and *Cleve* and another agreed that the *Cleves* should deliver and the *Cohens* accept and pay for 45 half-tierces of *Barrett's* anchor-brand twist tobacco, *ex* a certain ship called the *Roxburgh Castle*, to arrive, at the price of 5s. per pound in bond all round, and on other terms specified in the contract; breach alleged that though the *Roxburgh Castle* arrived after the agreement without 45 half-tierces of *Barrett's* anchor-brand

twist tobacco, but with 45 half-tierces of a less valuable kind of tobacco, yet the *Cleves*, after such arrival and before suit, delivered to the *Cohens* 45 half-tierces of tobacco, *ex* the said ship, of a less valuable kind as and for the said 45 half-tierces of *Barrett's* anchor-brand twist tobacco, *ex* the said ship, so agreed to be delivered. And the *Cohens* not knowing, &c., and believing, &c., and that the *Cleves* were delivering, &c., under and in pursuance of the said agreement, received the said tobacco, and paid for the same at the rate, &c., according to the agreement. And the *Cleves* have not delivered to the *Cohens* 45 half-tierces of *Barrett's* anchor-brand twist tobacco, *ex* *Roxburgh Castle*. On demurrer to the breach,

Held, that the original contract was on a double event—the arrival of the *Roxburgh Castle* and her arrival with goods of the sort named; that the original contract was gone when the ship arrived without goods of the sort named; that on the subsequent facts of mere delivery and acceptance and payment, no implied warranty was imported; and that in the absence of such warranty, and of all fraud, the declaration was bad, and the Plaintiffs without remedy.

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" at three months, and the remaining half to be paid by the
 " Plaintiffs' acceptance at four months, on delivery to the
 " Plaintiffs of the certificates; the packages to be bonded
 " in merchantable condition, and any coopeage required to
 " be done by the Defendants."

The fifth breach in the declaration was framed thus:—
 " Though the said ship *Roxburgh Castle* arrived after the
 " making of the agreement without forty-five half-tierces of
 " *Barrett's* anchor-brand twist tobacco, but with forty-five
 " half-tierces of tobacco of a less valuable kind than
 " *Barrett's* anchor-brand twist tobacco; yet the Defendants,
 " after the arrival, &c., and before suit, &c., delivered to the
 " Plaintiffs forty-five half-tierces of tobacco, *ex* the said
 " ship, of a less valuable kind, as and for the said forty-five
 " half-tierces of *Barrett's* anchor-brand twist tobacco, *ex* the
 " *Roxburgh Castle*, so agreed to be delivered; and the
 " Plaintiffs not knowing, and not having the means of
 " knowing that the said tobacco was not *Barrett's* anchor-
 " brand twist tobacco, and believing that the same was
 " *Barrett's* anchor-brand twist tobacco, and that the
 " Defendants were delivering the same under and in pur-
 " suance of the said agreement, received the said tobacco,
 " and paid the Defendants for the same at the rate, &c.,
 " according to the agreement, &c.; and Defendants have
 " not delivered to the Plaintiffs forty-five half-tierces of
 " *Barrett's* anchor-brand twist tobacco, *ex* *Roxburgh*
 " *Castle*."

To this breach the Defendant *Daniel Cleve* demurred:
 —For that the breach sets forth neither breach of any con-
 tract nor commission of any wrongful act

Defendant's points:—The contract to sell was conditional
 on the arrival of the *Roxburgh Castle* with the goods on
 board. Such condition was never performed. No other
 contract was ever made in the nature of a warranty, or

otherwise ; and as no fraud is shewn, the maxim of *caveat emptor* applies.

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Plaintiffs' points :—Defendants having delivered tobacco as being that mentioned in the agreement, and having been paid for the same as being such, cannot take advantage of the fact that the tobacco mentioned in the agreement did not arrive, and are in the same position as if such tobacco did arrive. The facts set forth in the said count of the declaration created a new agreement between the parties.

Fellows for the demurrer.

Dawson for the declaration.

Fellows.—It is a simple case of a buyer who has an opportunity of inspecting, who takes delivery, and pays without doing so, and who then keeps the goods and sues us as if there had been a warranty or fraud when there was neither. They should have looked at the goods and rejected them ; or they should have returned them as soon as it was found out that they did not fulfil the contract. Both parties could then have been restored to their original position, which they cannot now.

The COURT called on *Dawson*.

Dawson.—Here is a contract by us to pay a long price for a particular brand of tobacco. Other tobacco arrives. That other tobacco is delivered to us as of the brand we agreed to pay the higher price for ; we pay for it on the faith that it is of the superior brand. The misrepresentation is discovered, and the question now is, are we who are entirely innocent to be remediless ? [*Stawell*, C. J.—But are not they equally innocent ? What misrepresentation is there unless you import into the new contract on which you rely the terms of the old one ? The original contract

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was conditional on a double event—the arrival of the ship, and her arrival with tobacco of the brand you wished to buy. But as one of those events never happened, that contract is out of the question. Then how is the Defendant affected with any knowledge, in the new contract which you must set up, that the goods were of any particular sort, and that they were not of the particular sort which the Plaintiffs assumed them to be. On the mere facts of delivery and payment, independently of the original contract, which is gone, how do you imply a contract to deliver any other goods than those actually delivered? That which my client bought has not been delivered to him. *Pickard v. Sears (t)*, *Cornish v. Abington (v)*, *Cave v. Mills (w)*. [Stowell, C. J.—If you exclude fraud, must not the action be either for money had and received, or on a warranty. Do you contend that there was what amounted to a warranty here?] I do. Moreover, they are estopped. They sold us a certain article, and delivered us another. They led us to believe that the goods which actually arrived were of the sort we bargained for. We paid on the faith of that belief which they caused on our minds. Their mouths are now stopped from saying that the goods which actually arrived were not such as they sold. *Ex parte Swan (x)*.

Hellows in reply.—Their case cannot be put higher than this—that we made an innocent misrepresentation. Now, that is no ground of an action by them; as appears by many cases—*Parkinson v. Lee (y)*, *La Neuville v. Nurse (z)*, *Budd v. Fairman (a)*; *Chanter v. Hopkins (b)*. A mere description is not always a warranty. To a warranty it is essential that there be some specific chattel in existence which is warranted. Anything short of that

(t) 6 A. & E., 469.

(v) 4 H. & N., 549.

(w) 7 *Ib.*, 913.

(x) 30 L.J., C. P., 113.

(y) 3 East., 313.

(z) 3 Camp., 350.

(a) 8 Bing., 49.

(b) 4 M. & W., 399.

is misdescription only. In this case it was innocent misdescription. Suppose a converse case—that the Plaintiffs had sold a horse to arrive for £200, and that a bull—a *Master Butterfly*—worth 2,000 guineas had arrived, could the other side have insisted on the specific delivery of the more valuable animal for the £200. *Lorymer v. Smith* (c), *Street v. Blay* (d). The buyer by sample has a right to inspect the bulk, and if he neglects to do so, and accepts and pays, and, after discovery, still keeps possession, he has no remedy. We did not warrant the tobacco as *Barrett's* anchor-brand twist; we only described it so, believing it was such. They should not have taken it without inspection when it arrived; or if they took it under mistake, they should have returned it when the mistake was found out, in a reasonable time, and they might then have got back their money. [*Barry, J.*, referred to *Olivant v. Bailey* (e), *Ohitty on Contracts*, p. 399, and *Josling v. Kingsford* (f). *Stawell, C. J.*—If we strike the original conditional contract out—which was gone as soon as one of the double events failed on which it was made conditional—there was nothing in the later acts of the parties to import anything about goods to arrive. The Plaintiffs, I will suppose, said “We want *Barrett's* anchor-brand twist.” The Defendants agree to sell goods. Goods were sent to the Plaintiffs, which they accepted and paid for. It was found that these goods were not such as the Defendants asked for. Could they sue the Defendants for not delivering such goods as they had asked for ?] Yes. [*Stawell, C. J.*—Cannot this declaration be supported in that way ?] It was assumed there that something was done by us in the way of contracting. But there was nothing at all done by us in the way of contract, independently of the original contract, which is gone. The only thing done by us is the delivery of these goods. There is nothing said by us about them. There is no contract by us, excluding the original

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(c) 1 B. & C., 1.

(d) 2 B. & Ad., 456.

(e) 5 Q. B., 295.

(f) 32 L.J., C. P., 394.

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contract, to deliver anything but what we did deliver. In fact, there is nothing in contract at all, so far as we are concerned; only an actual delivery. It is only by importing the original contract that you arrive at any contract to deliver anything, but what was delivered. Of course I do not contend that he could not return it; only that if he accepts what is simply delivered, and keeps it, he cannot say there is any contract of warranty, or breach of such contract.

STAWELL, C. J., delivered the judgment of the Court, as follows:—

The original contract in this case was conditional on the twofold event that the ship arrived, and that she arrived with goods of the sort mentioned. That contract was disposed of because both conditions were not fulfilled. The actual contract relied on is therefore one which is implied out of certain facts. Those facts are simply that a certain parcel of goods was delivered by the Defendants; that such goods were accepted by the Plaintiffs, and money paid for them; and that there was no fraud, misrepresentation or warranty. The articles were not returned when it was discovered that they were not what they were by both parties assumed to be, but were kept. Therefore an action by the Plaintiffs to recover back what they had paid, as money had and received to their use, will not lie. Then it is said that there was an implied warranty from the description; but that is only arrived at by importing the terms of the original contract, which is gone. There is no description in the contract declared on—the contract implied from the later facts—except by reference to the original contract. The Plaintiffs took the goods on an assumption, and paid for them; and they kept them after the error was discovered. All the difficulty which has arisen would have been avoided if they had then returned the goods. But having kept them, in the absence alike of any fraud, and of

any warranty of the goods, we think the action cannot be maintained. There must be judgment on the demurrer for the Defendants.

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Dawson asked leave to amend.

The COURT gave leave to amend within a fortnight, if Plaintiff should be so advised.

IN RE HOWARD SPENSLEY, ESQUIRE,
BARRISTER-AT-LAW.

September 12,
14, 27.

A RULE *nisi* had been obtained on a former day by the Attorney-General calling on *Howard Spensley, Esq.*, barrister-at-law to shew cause why he should not be disbarred or suspended from practice, on the grounds—(1) That he followed a trade or business within three years before he applied for examination as a candidate for admission to the bar. (2) That being so disqualified for admission, he obtained admission to the bar of Victoria by improper means. The Court had intimated that the rule might, if Mr. *Spensley* desired, be made returnable in Chambers. By his desire, it was made returnable in Court.

H. S. was, during part of the three years next preceding his application to be admitted to the bar, the proprietor, printer, and publisher of a newspaper, and collected the debts of the paper, and printed for gain, matters not essential to the owning, printing, and publishing of the newspaper; he was also on the list of the

Ireland, Q.C., and *Dawson* appeared to shew cause.

Higinbotham, A.G., appeared to support the rule.

members of the Melbourne Stock and Share Exchange. Before admission to the bar he swore the necessary affidavit that he was not during the three years engaged in any "trade or business." On motion to disbar or suspend him on the grounds (1) that he had followed a trade or business, and (2) that being disqualified thereby, he obtained admission by improper means,

Held, that he had followed a trade or business, and was disqualified as to the portion of the three years during which he did so; that the Court was not satisfied he had obtained admission with knowledge of his disqualification; and that the case was met by suspending him from practising at the bar for twelve months.

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The affidavits in support of the rule *nisi* had gone to shew that Mr. *Spensley* had sworn an affidavit in the form required of candidates for the bar by the *Supreme Court Rules*, that he had not been engaged in any trade or business during the three years next before the time of his application for examination as a candidate; but that he had also sworn another affidavit within those three years, in which he described himself as proprietor and editor of a suburban newspaper. To the affidavits in support of the rule *nisi* were also annexed a verified receipt signed by Mr. *Spensley*, on a regular printer's bill, for work done by his firm, in printing some election posters for a member of the Legislative Council.

An affidavit had also been before the Court that Mr. *Spensley* had during the three years acted as a stock and share broker on the Melbourne Stock and Share Exchange.

In answer to these affidavits, an affidavit by Mr. *Spensley* was now read as follows :—

1. That in consequence of certain promises made and held out by Mr. *Franklyn*, the proprietor of the *Herald*, Melbourne newspaper, some time in the year 1860, to give me the commercial editorship of that journal so soon as a vacancy of that kind occurred, I identified myself with the Melbourne Stock Exchange, mainly with the view of qualifying myself to fill that or any similar office; and I say that the exhibit hereunto annexed marked A is a letter signed by the said Mr. *Franklyn*, and that its contents are true.

2. That in consequence of the advantages derived by the members of such exchange, and their facilities for obtaining commercial and other valuable information, I continued a nominal member of such exchange down as far as the month of July, 1861.

3. That throughout my membership my connexion with such exchange was more nominal than real, and existed chiefly on account of the information and advantages it afforded me in my connexion with the press of this colony; and it was generally known and understood by the other members of the exchange that such only was my object in continuing to be a member thereof.

4. That previously to the month of April, 1861, I had but few transactions as a broker; and having searched my papers and records, and those of the exchange, I swear, to the best and utmost of my recollection, knowledge, information, and belief, that I transacted no business whatever as a broker, or as a member of the said exchange, after that period.

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5. That the members of such exchange during the time I was a member thereof—who are now, as I believe, resident in or near Melbourne—are Messrs. *William Clarke & Sons*; Messrs. *Baillie, Butters & Co.*; *John Everard, David Lyons*; Messrs. *Gavin G. Brown & Co.*; *H. J. Clarke*, and *W. H. Cropper*; and that the exhibits hereunto annexed marked with the letters B, C, D, E, F, H, I, are signed by *Jonathan Binns Were*, and by the said *H. J. Clarke, J. Everard, Messrs. Baillie & Butters, Messrs. Gavin G. Brown & Co., Messrs. William Clarke & Sons*, and *David Lyons*, and the contents of such exhibits I believe to be true; and that I am informed that the said *W. H. Cropper* is at present confined to his house from illness.

6. That in February, 1862, I became the editor and proprietor of the newspaper called the *Telegraph*, published weekly at Prahran, and that I continued such editor and proprietor solely to the 16th day of May of the same year, when I associated myself with Mr. *Michael Joseph Goldsmith*; and that after such association down to the month of October of the same year I was the sole editor of the said newspaper, the details of which were managed solely and exclusively by the said *Michael Joseph Goldsmith*; and from the said month of October down to January, 1864, the said newspaper had been published in the names of *Howard Spensley & Co.*, but for the sole and exclusive benefit and advantage of Messrs. *Wardrop & Martin*, the purchasers of the said newspaper; and that during the said period I had no interest whatever in the profits of the said newspaper; but, on the contrary, was retained and employed on the said newspaper by the said Messrs. *Wardrop & Martin*, merely and only in the capacity of editor and reporter, for which I was remunerated by a fixed salary only.

7. That after the said Messrs. *Wardrop & Martin* had become the proprietors of the said newspaper, and whilst I was retained and employed by them as the editor and reporter thereof as aforesaid, they the said Messrs. *Wardrop & Martin* did printing, among other persons, for Mr. *Fellows*; and it is quite true that Mr. *Fellows* upon one occasion, on my seeing him upon an election matter in connexion with my reporting duties, paid me by cheque an account due by him to the said newspaper for printing and advertising in connexion with his election; but I say that I received such cheque merely as the agent of the said proprietors of the said newspaper, Messrs. *Wardrop & Martin*.

8. That it is quite true that the said Messrs. *Wardrop & Martin* also did printing for the St. Kilda Municipal Council, and that on one or

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two occasions (I believe not more) I was paid the amount of the account for such printing; but I say that such payments were made to me on occasions when I visited the St. Kilda Court-house as reporter for the said newspaper, and as a matter of convenience only—a paid collector being employed on the staff of the said paper; and that the moneys I so received were paid into the banking account for and on behalf of the said newspaper; and I say that I had no beneficial interest whatever in the said cheque given me by Mr. *Fellows*, or the said moneys I received from the St. Kilda Municipal Council, excepting so far as my said salary may have been paid thereout, but, on the contrary, I declare that I received such cheque and such moneys solely and only for and on behalf of the said Messrs. *Wardrop & Martin*, as such proprietors of the said newspaper, under the circumstances hereinbefore mentioned.

9. That the letters hereunto annexed, marked G and J, are letters written by *Thomas Jaques Martin* and *Archibald Bird Wardrop* (the said proprietors of the said newspaper), and their contents are true.

10. That although from the month of February, 1862, down to October, 1862, I was interested as aforesaid in the said newspaper, still my actual connexion therewith was of a literary and editorial character; that the details were wholly managed by subordinates; that I am not and never was by occupation a printer, nor do I possess the slightest knowledge thereof.

11. That during the whole of the three years next previous to my call to the bar of this honorable Court, and contemporaneously with my studies to qualify myself for passing the necessary examinations, I, as a means of livelihood for myself and family, was engaged on the literary departments of the press of this colony, and I have always understood, and still believe, that such or similar occupations do not constitute a trade or business within the meaning of the rules of practice of this honorable Court.

12. That during the whole of the terms in the years 1862 and 1863, I regularly attended the law lectures at the Melbourne University, and successfully passed the examinations therein.

13. That I also successfully passed before the Board of Examiners appointed by this honorable Court for that purpose, prior to my call to the bar as aforesaid, my examination in the ancient Greek and Latin classics, logic, Roman, Grecian, and ancient history, universal and constitutional history; and I humbly submit that I have in all other respects complied with the rules of this honorable Court in relation to the admission of barristers to practice therein in that behalf made.

Ireland first called attention to the question of jurisdiction; stating that he did not object to the jurisdiction, yet,

in performance of his duty, referred to *Re Justices of Antigua (g)*. He then went through the affidavits. On them he argued. (1) That the facts did not shew Mr. *Spensley* to have been engaged in a trade or business within the meaning of the *Supreme Court Rules*. (2) That he had not knowingly offended.

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The *Supreme Court Rule* gives no definition of the words used. Being proprietor of a newspaper, or of a squatting station, is no disqualification to continue at the bar; and if no disparagement after admission, why any before admission? [*Williams, J.*—The reason of the rule is not so much with regard to the position of the student as a gentleman, as with regard to the necessity for requiring that he should give his undivided time and attention to his studies.] If that were so, it would apply to reporters on the press. But that occupation has never been deemed an objection to admission. Lord *Campbell* was a reporter, and so were many of the Judges while students, before admission to the bar. [*Stawell, C. J.*—We are entrusted with the duty of regulating the admissions to the bar. The admission is a great privilege, and it is granted only on condition of an adequate return to the public. That return is secured, not merely by providing that the student shall pass certain examinations, but also by the further condition, thought beneficial, that the student shall to a certain extent, and in reference to occupations not tending to make his professional studies more efficient, set himself apart for the pursuit of his studies. That is the question to put, therefore—whether he has done what the law required in that respect? That question he chose to answer for himself. Instead of disclosing the whole facts to the Court, and, if entertaining a doubt, asking the Court if there were any objection to his admission, he swore as if no such facts existed. That was not treating the Court with the candour he was bound to do.

(g) 1 Knapp, 267.

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Barry, J.—He swore that he was not engaged in any trade or business. That was swearing to a conclusion. He had no right to draw the conclusion, and then swear to it as if he were deposing to matters of pure fact. Such a course was not candid or honorable. It is certainly not in such a case so much our duty to punish one as to prevent others; but is it not a serious question whether, regarding the integrity and honor of the profession, it would not be dangerous to admit to it persons making affidavits so contrary to the proper and plain meaning of words? It is not to be supposed when the Court is dealing with honorable men that mental reservations are used, and words employed in one sense when their intention is another. It may be dangerous to admit the profession to be invaded by gentlemen who regard the obligations of honor and candour in a different manner to that in which every other gentleman does.] I entirely adopt that sentiment; and assuming that the only question now is, whether there appears to have been any such mental reservation in this case, we submit the facts shew that there was not.

Dawson, on the same side, cited *Regina v. Gray's Inn* (h), *Gillingham v. Lang* (i), and *Patten v. Browne* (k).

Higinbotham, A.G., in reply—The rule is, no doubt, somewhat ambiguous, and the profession will regard with pleasure any lenient view of it, if the Court can hold *Mr. Spensley* to have acted in ignorance or inadvertence.

STAWELL, C. J.—The case is an important one to the profession. We will consider our judgment.

Cur. adv. vult.

(h) 1 Doug., 353.

(j) 6 Taunt., 532.

(k) 7 Taunt., 409.

The COURT now delivered judgment orally, as follows:—

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STAWELL, C. J.—The 9th clause of the rules of the Supreme Court, relating to the admission of barristers, provides that an applicant for admission to the bar shall subject himself to be examined by the Board of Examiners, and that he must reside in Victoria, and “not be engaged in “any trade or business, or practise as an attorney, solicitor, “proctor, or conveyancer, or act as clerk or writer to any “such person, or to any barrister,” for three years immediately before his submitting to be examined. An examination can only insure proficiency, and proficiency of a certain character; and that would be wholly insufficient as a check against the admission of improper persons to an honorable profession. If it were the only check, persons might be admitted to the bar, who, though they had attained a state of proficiency, would be shackled and embarrassed by habits which were inconsistent with the proper practice of an honorable profession. Not only that, but persons so admitted might turn their former habits and connexions to an unfair advantage—unfair in regard to other competitors who did not possess such advantages. Although, therefore, an examination tends to test proficiency, it is not the sole test to which a student seeking admission to the bar, ought to be subjected; and therefore, it has been wisely determined that candidates for admission to the bar should not merely be subjected to an examination, but that during the three years preceding the examination they should withdraw from the pursuit of any vocation which is inconsistent with the practice of the profession to which they aspire.

The charge against this gentleman is two-fold;—first, that he had followed a trade or business within the three years; and next—which is the more serious of the two—that, knowing that he had followed a trade or business within the meaning of the 9th rule, he obtained admission to the bar by improper means.

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The facts are very simple, and are sufficiently explained by a reference to the dates. In April, 1860, the certificate required by the Rules of Court was obtained—the certificate being an intimation of the intention of the candidate to apply to be admitted to practice at the bar three years afterwards. In April, 1861, Mr. *Spensley's* name appeared as a member of the Stock Exchange. In February, 1862, he made an affidavit that he was editor and proprietor of the *Prahran Telegraph* newspaper; and in October of the same year, according to his affidavit, he ceased to be the proprietor of that newspaper, and remained simply editor—the proprietorship from that date being vested in another person with whom he was associated. In March, 1863, he is found collecting an account—receiving a cheque and giving a receipt—for printing business connected with the *Prahran Telegraph*; in August, 1863, he obtained a certificate from two practising barristers, declaring that he was a fit person to be admitted to practise at the bar; in March, 1864, he went through the necessary forms, and was examined by the Board of Examiners: and in April of that year he was admitted. Now, if the second allegation against Mr. *Spensley* be substantiated, he has not merely infringed the 9th rule, but has wilfully misled the Court in a matter respecting which it was all-important that the Court should be fairly and candidly dealt with. A person who would stoop to such unworthy means of gaining admission ought not to remain a barrister of this Court, and if disgraced by being disbarred under such circumstances will be utterly unfit to be again admitted to the bar. It is necessary, therefore, to see whether the charge made against this gentleman is clearly substantiated by the evidence. The occupation of a newspaper proprietor may not be considered a trade in one aspect, but in my opinion it certainly is a business, and a business which falls within the meaning of the 9th rule. Not unfrequently the same person is both proprietor and editor; but where the offices are severed, and the duties discharged by different persons, there is a wide distinction.

in the intellectual scale. The proprietor may possess a certain amount of capital, but a very small amount of intellectual attainments indeed; whereas an editor must necessarily be a man of intelligence, of education, and of peculiar aptitude for that calling. The editor, therefore, in the intellectual scale is far superior to the mere proprietor, who simply invests capital in the newspaper and carries it on as a trade. It appears that Mr. *Spensley* acted as editor and proprietor from February, 1862, to October in the same year. As proprietor he must also have been necessarily connected with printing, but if the printing were only conducted for the purpose of furthering the objects of the proprietor, I cannot look upon the proprietor in the same light as a printer in the ordinary acceptation of the word. There can be no doubt that Mr. *Spensley* was aware of the necessity of abstaining from trade or business from the period when he gave in his certificate, in April, 1860, for, according to his own account, he ceased to act as a broker of the Stock Exchange, remaining a member of it merely that he might be enabled to procure information on commercial matters which would be useful to him in connexion with the press. His affidavit in applying for admission as a barrister cannot, therefore, have been made in forgetfulness of his position. The only question is whether he believed that, acting as proprietor and editor of that newspaper, he was guilty of an infringement of the rule which required that a person seeking admission to the bar should abstain from any trade or business for three years? Whether the proprietorship of a newspaper is a trade or not, there can be no doubt that it is a business; but Mr. *Spensley* swears that he did not believe that the conducting of that business was an infringement of the rule of the Court. I cannot say that the affidavits satisfied me that Mr. *Spensley* believed that, in continuing to act as the proprietor of a newspaper while he abstained from acting as a broker, he did that which he knew to be contrary to the 9th rule. Mr. *Spensley* says he had no doubt that

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acting as proprietor of a newspaper was not engaging in a trade or business within the meaning of the rule; but, though there was a doubt on the matter, I do not think that, upon the evidence, the Court would be justified in disbarring Mr. *Spensley* on the ground that he wilfully infringed the 9th rule. It may have been supposed that the Court has pronounced on all objections which might have been raised, although they were not raised against the admission of any person to the bar. Now, this is not the case. This Court, as regards the admission of persons to practice at the bar, is the Court of Appeal in this colony; and it may be called upon to hear accusations against members of the bar or gentlemen aspiring to be called to the bar. Nothing would be more deplorable than to see the Court lowering its character and dignity by stooping to the unworthy position of accuser. The Court cannot move in such matters unless the facts are brought judicially before it, and it rests with the bar itself to bring any circumstances under the notice of the Court. I have no desire to agitate matters now at rest, but I cannot conceal from myself that there may have been several facts which may have justified, and, I believe, did justify to a certain extent the erroneous opinion which Mr. *Spensley* says he entertained, that acting as the proprietor of a newspaper was not an infringement of the 9th rule, relating to the admission of barristers. I think, therefore, that the Court ought not to say that the second ground upon which the rule was obtained has been substantiated.

It remains to be considered whether Mr. *Spensley* has infringed the Rule of Court. It is quite clear that he has not abstained from "any trade or business" during the whole of the three years preceding his examination; and it is much to be regretted that he did not bring the circumstances before the Court at the time of his admission, as he ought to have done. I cannot say that Mr. *Spensley* has concealed the doubt, because that would imply that he had concealed

it wilfully; but I think that he failed to state candidly and openly the facts which he ought to have brought before the Judges. The period during which Mr. *Spensley* admits that he had carried on trade or business, cannot be allowed to form a portion of the three years. He himself states that it was not until October, 1862, that he ceased to be the proprietor of the *Prahran Telegraph*. The three years, therefore, under the most favourable aspect will not expire until October, 1865—a year hence, and for that period he must be suspended from practice, but his admission remains.

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BARRY, J.—I concur in the opinion of the Chief Justice, and regret that Mr. *Spensley* has not saved the Court from the painful decision which is forced upon it, as he might have done by adhering to a reasonable interpretation of the rules, which to my mind are very easy of being understood. It is the duty of every candidate for admission to the bar to read the Rules of Court; and if any doubt as to their meaning occur to him during his tuition, or if he have any doubt as to whether he is complying with them, he can easily make inquiries of the professional gentlemen with whom he is associated, or apply to the Board of Examiners for their advice. The position in which the bar of this colony stands is not generally understood by the outer world. There are no Inns of Court in Victoria as in England, and no benchers to exercise control and supervision over the students seeking admission to the bar: but the appointment of a Board of Examiners by the Rules of the Supreme Court—which rules were framed by the Judges, but had also the concurrence of the bar—formed as near an approach to the establishment of a body of benchers as the circumstances of the country would admit of at the time the rules were framed, and was certainly a great advance on the system which previously existed, when the judges alone were the persons to decide upon the legal proficiency and social standing of candidates for admission to the bar. The Board of Examiners has all the independence of an Inn of

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Court or a body of benchers, as it is composed of barristers selected from the bar itself, with the assistance of the Attorney-General and Solicitor-General. Candidates are required to comply with the 9th rule, and it seems to me that there is no difficulty in expounding the meaning of that rule. In the first place, the gentlemen seeking admission to the bar must be of "good fame and character," and they must not be engaged "in any trade or business" during the three years next preceding the time when they submit themselves to be examined. These regulations have anticipated to a certain extent provisions which have recently been made by the Inns of Court in England. The words "trade or business" are not included in their regulations, but it is distinctly understood by the benchers that the students are not to engage in trade or business. I see no difficulty in expounding what is meant by "trade or business." "Trade" is a matter which is as well understood as any expression in the English language; and, moreover, if there be any difficulty in defining it, it is defined by the law respecting bankruptcy and insolvency. There is not so clear an exposition of the word "business" in those Acts; nevertheless, it is not by any means difficult of explanation. Certainly "business" is not the same as "trade." Business may vary under different circumstances; for instance, there are certain businesses in this country which are not so well known in others. Business is something which engrosses the attention of a man, either in mercantile, commercial, or other occupations, and draws him away from the pursuit of those studies which are to fit him for following the profession of the bar. A candidate for admission to the bar cannot complain that he is harshly dealt with by being required to abstain from trade or business during the three years preceding his examination, for solicitors, proctors, and also conveyancers, are obliged to observe a similar regulation. Moreover, there are many species of business which are totally unsuited to a gentleman preparing for the profession of the bar.

With respect to the particular case now before the Court I would observe that the position of editor or proprietor of a newspaper may be completely distinct from either trade or business. A proprietor of a newspaper may take no part whatever in the management of the business of the paper, but simply be a person who shares in the profits of the concern. No better illustration of this can be given than *The Times* newspaper, some proprietors of which are gentlemen who take no part whatever in the management. In the instance before the Court, the case was very different. Mr. *Spensley* was both proprietor and editor of the paper, and engaged himself in the business of collecting its income. There is evidence also of his carrying on the trade of a printer, not merely printing subsidiary and ancillary to the production of the newspaper, but printing of an independent character, carried on in the office of the paper. In extenuation or explanation, it is said that this printing was more or less connected with the newspaper—that it arose incidentally out of some electioneering address published in the newspaper. That, however, is a distinction which ought to have been sufficient to have induced Mr. *Spensley* to have disclosed the facts to the two barristers to whom he applied on the 8th of August, 1863, to certify that he was a fit person to be admitted to practise at the bar. If he had disclosed his position to those two gentlemen—if he had told them that twelve months previously he was editor and proprietor of a newspaper and carried on a printing business, and that a year before that he had been a member of the Stock Exchange, it is impossible to believe that they would have signed a certificate stating that he was not engaged in trade or business during the three years immediately preceding. It is to be regretted that, instead of inviting the opinion of those or other professional gentlemen as to whether he had complied with the rules, he took upon himself to decide the matter. It is clear that he was mistaken; but it is urged that he believed that he was justified in doing what he did. He is accused of wil-

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fully deceiving the Court by concealing facts, which, however, must have been known without difficulty, because his affidavit declaring that he was proprietor of the *Prakras Telegraph*, was sworn before a Judge of the Supreme Court, and his recognizances as newspaper proprietor were entered into before the Judge. These are facts which he could not conceal; and facts he knew when he stated that he was not engaged in trade or business at a time when it was obvious that he was engaged in both. He, therefore, violated the rule, and is amenable to the consequences. The Court acquits him of any intention to deceive or to mislead the Court, though they are not satisfied that he acted with that candour which ought to have induced him to disclose his true position when he applied to be admitted.

I am of opinion that Mr. *Spensley* should be suspended from practice for the period of twelve months, which is yet required to complete the three years during which it was his duty to abstain from any trade or business before practising at the bar.

WILLIAMS, J.—I concur in the opinions already expressed. A gentleman seeking admission to the bar of this colony obtains that privilege upon much easier terms than gentlemen obtain the same privilege in England. Much less time, much less labour, and certainly much less expense, are required. The least, therefore, that gentlemen seeking admission to the bar of Victoria can do, is to observe most strictly all the obligations which the rules impose. The difficulty in this case is to ascertain what Mr. *Spensley's* state of mind was at the time he sought admission to the bar—whether he really knew that he was doing wrong; and, when he made the affidavit stating that he had not been engaged in any trade or business for three years, knowingly concealed the facts from the Court. If such were his state of mind, undoubtedly he ought to be disbarred at once and for ever;

but if, on the contrary, he was simply mistaken in stating that he was not engaged in any trade or business, the case is very different. If there had been any evidence to shew that he had had conversations with persons, proving that he was aware that he was engaged in trade or business, within the meaning of the rule which forbids that, the Court might have come to a different conclusion from what it has come to; but there is no such evidence, and, therefore, I think we ought to put the most lenient interpretation on Mr. *Spensley's* conduct. I hope that the judgment of the Court will act as a warning and example to others seeking to obtain admission to the bar, and that, if they are in any doubt as to whether they have been engaged in any trade or business during the three years preceding their application to be admitted, they will disclose the facts to the Court, and not take upon themselves to decide the matter.

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*Judgment that Mr. Spensley be suspended
from practice at the bar for twelve
months.*

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Where, on a complaint before the Warden of a gold-field, the Warden refuses to interfere, there is no appeal to the Court of Mines.

Bray v. Mullen and Power v. McDermott reviewed and acted upon.

WARDLE AND OTHERS, APPELLANTS, v. EVANS,
RESPONDENT.

SPECIAL case from the Court of Mines at Daylesford. *Wardle* and others summoned *Evans*, under "*The Gold-fields' Act*," No. 32, section 76, as manager of the Tweed-side Company, for "fluming over," and thereby "interfering with," a water-right which *Wardle* and others "then enjoyed" under "*The Gold-fields' Act*," and grants issued in accordance with it.

The Warden held that there had been no interference and he dismissed the summons.

Wardle appealed to the Court of Mines. When the case came on before the Court of Mines the Judge was referred to the decision of this Court in *Power v. McDermott* (1). The Judge then doubted if any appeal lay to him, under either the 84th or the 88th section of "*The Gold-fields' Act*." He said he could not see how he could "vary" such a decision as the Warden had given, except by "reversing" it; and he doubted his power to "reverse," because the 88th section of No. 32 gives the Court of Mines no machinery to enforce any decision of reversal. He stated the question for the opinion of this Court.

Bunny for the Appellants.—Conceding that when there is a party in occupation and the Warden refuses to oust him, there is no appeal, I contend that there is an appeal in all other cases. Now, we are in possession of our water-right, and they interfere with our possession. The Judge says he cannot vary the decision, if variance amounts to reversal. Why not? In one sense every varying of a

(1) 2 Wy. & W., Law, 241.

decision is a reversal of it; and there are many decisions which are decided reversals which yet do not constitute the exact reverse of the decision reversed.

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J. W. Stephen for the Respondent.—In *Bray v. Mullen* (m), this Court decided that reversing is not varying. [*Stawell*, C. J.—It appears to me that *Bray v. Mullen* decides this case. You cannot carry out another decision by the Judge of the Court of Mines without reading “reverse” as “vary.” *Barry*, J.—Is there not an appeal if the facts bring it within the 84th section, without reference to the 88th? Surely if the Judge and the assessors give damages we should be entitled to work out that verdict in any way the law enables us, whether the machinery is given by these sections or not.] The only part of the decision in *Bray v. Mullen* which was necessary to that case is in our favor. It was not necessary to answer all the questions put to the Court in that case.

Cur. adv. vult.

STAWELL, C. J.—This was a special case, stated for *September 27.* our opinion by the Judge of the Court of Mines at Daylesford. The point raised is substantially whether, in those instances where the Warden declines to make an order, any appeal lies to the Court of Mines? Two cases have already been before this Court, in which a question arose substantially similar, though not the same in all particulars. In the first, *Bray v. Mullen*, questions were asked by the Judge of the Court of Mines at Ballarat. The Judge was of a different opinion from the Warden, but was doubtful, if he made an order reversing the Warden’s decision whether he had the power to enforce the reversal. [His Honor read the questions as stated *infra*, p. 192 (n).] This Court held that reversing was not varying; that the words appear—

(m) Sup. Ct. Vic., Dec. 1860, *Vide infra*, p. 191.

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ing in the Act were advisedly used where used and omitted where omitted, and that though a general power was given by section 84, yet that power was restricted by the limited means of enforcement given in section 88. In a subsequent case—*Power v. McDermott*, the Court held that where the Warden has declined to make an order, there is no appeal to the Court of Mines. It is said that that case may be distinguished from this in so far as there the complaint before the Warden was one by a person not in possession, and that this is a proceeding by a person in possession, at all events, of the water-right, if not of the land itself, which is asserted to be in the occupation of the opposite party—that this is a complaint by a person in possession, and that therefore the reasoning used in support of the former case is not applicable. Any one who studies that Act must be struck with the care with which it has been framed. [His Honor read and contrasted the 84th and 88th sections.] Yet throughout the whole of the latter section there is no power to enforce a decision reversed, unless the Court reads reversing as identical with varying. A power is conferred to enforce a particular sort of decision by the Court; and the Act, by specifying that power alone, in effect declares that that is the only point on which the Court shall have the power to enforce its decision on appeal. I cannot but think it was designedly left out. The whole system of mining has changed. The amounts of capital now invested in mines were not then known. It may have been intended to discourage litigation and to say in such cases, if the Warden decides there is no grievance, the matter shall rest. Under the change of circumstances a power might be necessary and wise now which was not given then. That is a matter for the Legislature alone. According to the Act I think the power does not now exist.

BARRY, J.—I am of opinion that the cases of *Bray v. Mullen* and *Power v. McDermott* govern this case. I do

not concur in the view that this case differs from those in principle.

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WILLIAMS, J.—I think that the Judge of the Court of Mines is not to decide on what he cannot enforce; and from the 88th section I think it is clear that he cannot enforce his decision when the warden has declined to interfere.

Question answered accordingly (c.)

(c) BRAY AND ANOTHER, APPELLANTS, v. MULLEN AND OTHERS, RESPONDENTS.

THE facts and questions stated in this case, and the answers of this Court, were as follows :—

“ Complaint under 77th section of the Act No. 82. The appellants in their case before the Warden stated that they were entitled under their miners’ rights to take possession of and occupy for mining purposes a portion of Crown land then in the possession of the respondents, and which the respondents claimed to continue to occupy under the said Act; and the appellants by their complaint sought that they, the appellants, should be adjudged to be entitled and should be put in possession.

“ The Warden’s decision :—‘ I find that the ground applied for has not been abandoned, and therefore refuse the application of *Joseph Bray* and *John Thomas* the appellants.’

“ The appellants appealed under sections 84 and 88.

“ The appeal came on to be heard on the 11th September. Upon the nature of the case being stated by counsel for the appellants the Judge expressed doubts whether the Court had any other than an imperfect jurisdiction, inasmuch as although the case came within the general words of the 84th section giving an appeal to the Court of Mines from the decision of any Warden, yet neither that section nor the 88th provided any mode by which a decision of the Court, if it should reverse the Warden’s decision in any such a case as the present, could be enforced, those sections providing only two modes by which the decision of the Court of Mines in its appellate jurisdiction is to be enforced :— first, by the Warden himself, as executing his own decree when his decision is varied by the Court of Mines, but which the Judge thought could not apply to this case, inasmuch as to afford relief to the appellants the Warden’s decision must be reversed, not varied: second, by the Court’s own process executed by its own officers in the case of damages,

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or by the Warden in cases of possession, but which process is by those sections only to be exercised where damages or restitution were awarded, or where possession of a claim or any share in a claim was ordered to be *restored*, and in the present case the appellants had never been in possession and therefore had never been disturbed in their possession either by the act of the respondents or by the decision of the Warden, and as there could be no loss of a thing never possessed, so there could be no restitution of a thing never lost. The Judge then postponed the further hearing of the appeal until he should have obtained the opinion of the Supreme Court, in accordance with section 70 of "*The Gold-fields' Act*," 21 Vic., No. 32. The following are the questions which, upon the foregoing case, are therefore submitted for the opinions of their Honors the Judges of the Supreme Court.

"*First Question*.—Whether, in the event of the Court of Mines reversing the Warden's decision, can the Warden be compelled to enforce the decision of the Court of Mines, as though it had been the Warden's decision *varied* by the Court of Mines?

"*Second Question*.—Whether, in the event of the Supreme Court deciding the first question in the negative, can the Court of Mines, if it should reverse the Warden's decision and find the appellants entitled to take possession, make an order that possession of the ground in dispute shall be given up by the respondents to the appellants, and if so, how can such an order be enforced?

"*Third Question*.—Whether, in the event of the Supreme Court deciding both the first and second questions in the negative, would the Judge of the Court of Mines be justified in dismissing the appeal, upon the ground that the jurisdiction of the Court of Mines was imperfect, inasmuch as if the appellants succeeded, the statute had provided no mode by which the decision of the Court could be enforced?

"J. W. ROGERS.

"7th November, 1860."

The answers of the Supreme Court were as follows:—

"The COURT is of opinion as to the first question asked in the special case that reversing is not varying. Both words are used in the same section, and the powers expressly conferred in the case of varying are not to be impliedly inferred in case of reversal.

"As to the second question that the Court of Mines has not jurisdiction to make an order in the terms specified in the question.

"As to the third question that the grounds stated are not grounds for dismissing the appeal."

REGINA v. TUCKER AND ANOTHER.

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CASE stated, without pleadings, for the opinion of the Court, whether the Defendants, as landlords, could distrain on the property of the Crown for rent in arrear.

The property of the Crown is not subject to distress for rent in arrear due to the landlord of the premises on which the property is found.

Frederick Thesiger Lavender was, under the "*Weights and Measures Act*" (n) on the 10th December, 1862, appointed inspector of weights and measures for the counties of Dalhousie and Anglesey, and part of the municipal district of Malmesbury, in Victoria. As such inspector, he received custody of certain authorized copies of the standard weights and measures, which were the property of the Queen, and were to be used in his office. He gave a bond to the Crown for £100, conditioned to be void if he safely kept the things entrusted to him, and gave them up to such person as the Commissioner of Trade and Customs should appoint. He rented an office at Kyneton of Defendants, as a place of safe deposit and convenient use of the standards. The rent falling in arrear £26, application was made to the Commissioner of Trade and Customs for it. The application being rejected, the standards were seized by way of distress, and sold for £29 11s. This action was brought against the Defendants to recover back the standards, and by the terms of the case stated, if the Court should be of opinion that the action did not lie, then a *nolle prosequi* was to be entered; but if the Court should hold that the action did lie, then a verdict for the Crown was to be entered for £113, subject to be reduced to 1s. if all the standards were, within fourteen days after the Court should have delivered judgment, given up at the office of Trade and Customs, in Melbourne, in as good order and condition as when distrained upon by the Defendants.

(n) No. 151.

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Harris for the Crown.

Dawson for the Defendants.

The ancient authorities cited are found in *Gilbert on Distresses*; *Bradbury on Distresses*; *Com. Dig. Tit. "Distress"*; *Mayhew v. Herrick*, (o); *Lancashire Waggon Coy. v. Fitzhugh* (p); *Mears v. S. W. Ry. Coy.* (q); *Manning's Exchequer Practice*, 41; and *Chitty's Prerogatives*, 376.

PER CURIAM.—The property of the Crown is not subject to distress for arrears of rent due to the landlord of the premises on which that property is found.

Judgment for the Crown; damages £113, to be reduced to 1s. on the standards being given up at Melbourne in good condition.

(o) 7 C.B., 229. (p) 6 H. & N., 502. (q) 2 C.B., N.S., 859.

IN RE JOHN PERRY LYONS.

September 27.

Where on the last day of term the term had been enlarged for two days for the disposing of business pending at the end of the last day of term, the Court refused, on the ground of want of jurisdiction, to hear a motion not in the list of the business pending at the end of the last day of term.

MACKAY essayed to make a motion of course, in a matter not pending when the Court, on the 14th September, enlarged the term by adding yesterday and to day for disposing of business pending on the 14th. He referred to some other matter which he regarded as a precedent in his favor.

STAWELL, C. J.—This matter was not in the paper. We have no jurisdiction.

WILLIAMS, J.—The other matter mentioned by you was a mere correction of former business. This is not like that.

END OF MICHAELMAS TERM.

CASES
 ARGUED AND DETERMINED
 IN THE
Supreme Court of Victoria,
 AT LAW,
 IN
 HILARY TERM, 28 VICTORIÆ.

The Judges who sat in Banc in this term were—

STAWELL, C. J. WILLIAMS, J.
 BARRY, J.

REGINA v. HOOPER.

1864.

November 24.

QUESTION of law reserved and case stated by his Honor Mr. Justice Barry, as follows:—

“The prisoner was informed against for forging a cheque upon the Colonial Bank; also for uttering. The cheque was as follows:—‘No. August, 1864. The Colonial Bank of Australasia. Pay or bearer fifteen pounds £15. *W. E. Lewis.*’

“On Thursday, July 28, 1864, prisoner came to the Bridge Inn, at Darebin Creek, with his wife, and said to the land-

started for Melbourne, *H.* asked for the cheque back, saying a friend was coming to the house who would give him some money. The landlord did not return the cheque, but took it to Melbourne, where it was dishonored. When the landlord got home again that day *H.* was gone. On being arrested ten miles off, he said, “I gave the cheque to him to quiet him (the landlord) till the mail comes in.” By the English mail *H.* did receive £40. *H.* was convicted of forging, and acquitted of uttering.

On a case reserved, *Held*, that the conviction was right.

W. W. & A. B. VOL. I.—LAW.

H. went to a country inn near Melbourne, and in fourteen days ran up a bill of £13 7s. 6d. The landlord did not apply for payment. *H.* gave the landlord a forged cheque for £15 to get cashed in Melbourne. Next day, before the landlord

1864.
 REGINA
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“ lord, ‘I’ve a furnished room at South Yarra, but am
 “ ‘ordered to take my wife to the country for the benefit of
 “ ‘her health. I want private accommodation. My name
 “ ‘is *William Lewis*.’ He remained at this inn for four-
 “ teen days, when his account amounted to £13 7s. 6d.
 “ It did not appear that the landlord had applied for pay-
 “ ment. On the 9th August, the landlord drove into
 “ Melbourne. On his return home, prisoner said to him,
 “ ‘Did you not hear me cooeying to you? I wanted you
 “ ‘to get a cheque cashed for me.’ To this the landlord
 “ replied, ‘I’ll take it to town for you to-morrow.’ The
 “ prisoner then gave him the cheque produced. Next
 “ day, before the landlord left home, the prisoner said to
 “ him, ‘You need not present that cheque. A friend of
 “ ‘mine is coming down from Anderson’s Creek; he’ll give
 “ ‘me some money.’ The landlord replied, ‘It’s no odds;
 “ ‘I’ll be back by the eleven o’clock omnibus.’ On August
 “ 10th, the landlord went to Melbourne, and presented
 “ the cheque; it was dishonored. He returned home at
 “ eleven o’clock a.m. The prisoner in the meantime had
 “ left the Bridge Inn. Prisoner was arrested the same day at
 “ Eltham, some ten miles from the Bridge Inn. It was proved
 “ by *John Smith*, a butcher at Templestowe, that the form on
 “ which the cheque was filled up was taken from his cheque-
 “ book given to him by the Colonial Bank; and that he had
 “ left this cheque-book at *Robert Mundy’s* hotel at Temple-
 “ stowe, some time previous. By *Robert Mundy*.—That
 “ *Smith’s* cheque-book in question had been left at his
 “ (*Mundy’s*) house, and was there hanging behind the bar
 “ about a week before the arrest of the prisoner; and that
 “ the prisoner had called at his (*Mundy’s*) house, with the
 “ landlord of the Bridge Inn, about then, and had stayed at
 “ his house for some short time. After the arrest, and while
 “ prisoner was being taken by the constable to Heidelberg,
 “ prisoner said, ‘I gave the cheque to him to quiet him’ (the
 “ landlord) ‘till the mail comes in.’ The prisoner did receive
 “ some £40 from England in Post-office orders some short

"time after the event. It was contended by the learned
 "counsel for the prisoner that there was no case to go to the
 "jury, and that he ought to be acquitted, for—(1) Though
 "the prisoner may have used the name of *Lewis* for the pur-
 "pose of fraud, there was no evidence that he assumed
 "it for the purpose of this forgery. (2) There was no
 "evidence that the prisoner had assumed the name of *Lewis*
 "to defraud the landlord of the Bridge Inn, to whom
 "the cheque was given. (3) There was no evidence that
 "the prisoner had assumed the name of *Lewis* in order to
 "defraud. I held that the case should go to the jury. The
 "prisoner was found guilty on the first count, not guilty
 "on the second count. The question submitted for the
 "consideration of their Honors the Judges of the Supreme
 "Court is, whether the verdict of the jury can be supported
 "by the evidence?"

1864.
 REGINA
 v.
 HOOVER.

Adamsen for the Crown.

F. L. Smyth for the prisoner.

The authorities cited were—2 *East's Pleas of the Crown*,
 853; *Rex v. Bontien* (r), *Rex v. Peacock* (s).

The COURT upheld the conviction.

(r) R. & Ry., 260.

(s) *Ib.*, 178.

1864.

November 25.

Under the Act No. 59, sec. 5, the Board of Land and

Works caused a water-pipe and stop-cocks to be laid so as to convey a supply of water within a messuage belonging to *F.* On the 12th February, 1864, *F.* gave notice to the Board that it was his intention to discontinue the use of water supplied to his messuage after that date, and paid the rates up to the 30th June, 1864. Before the 30th June, 1864, *F.* removed the pipe and stop-cocks, so that a supply of water could no longer be conveyed within the messuage unless a proper pipe and cocks

were again laid. *F.* used no more water, but the Board were always ready and willing to supply him. *F.* refusing to pay water-rates after June, the Board distrained; and an action was commenced, and this case stated without pleadings, the question for the Court being whether the distress was legal.

Held, that the laying down of a service-pipe and stop-cocks to each occupation was equivalent under the Act No. 59 to an actual supply of water; that payment was compulsory after such supply whether the water were used or not; and that the distress was legal.

FELLOWS v. THE BOARD OF LAND AND WORKS.

SPECIAL case stated by the parties without pleadings, as follows:—

“The Defendants caused notice to be given, in accordance with the Act 21 *Vic.*, No. 59, sec. 5, and in compliance with that notice, the Plaintiff being the owner of a messuage, and referred to in such notice, caused a proper pipe and stop-cocks to be laid, so as to convey a supply of water within such messuage.

“The Defendants (under section 8) duly made rates for the supply of water, and the Plaintiff duly paid such rates up to the 30th day of June, 1864.

“The Plaintiff, on the date thereof, gave to the Defendants the following notice:—

“ ‘To the Board of Land and Works, Sewerage and Water
“ ‘ Department.

“ ‘ In pursuance of the “*Waterworks Clauses Act 1847*,” (10 and 11
“ ‘ *Vic.*, c. 17, s. 71), I hereby give you notice that it is my intention to
“ ‘ discontinue the use of water supplied by you to the dwelling-house
“ ‘ in my occupation in the Punt-road, Gardiner’s Creek-road, and that
“ ‘ I shall not use the same from this date, the rate in respect of such
“ ‘ dwelling-house having been already paid for the half-year ending on
“ ‘ the payment next after giving such notice.

“ ‘ THOS. HOWARD FELLOWS.

“ ‘ 12th February, 1864.’ ”

“ And before the said 30th day of June, 1864, he removed the pipe and stop-cocks hereinbefore mentioned, so that a supply of water could no longer be conveyed within the said messuage, unless a proper pipe and stop-cocks were again laid. Since the pipe and stop-cocks were so removed, the Plaintiff has not used any of the water, nor has the same messuage been supplied therewith, but the Defendants were always ready and willing to supply the Plaintiff with same. The Plaintiff having refused to pay water rates for a period subsequent to June, 1864, the Defendants levied the same by distress of the Plaintiff's goods in the said messuage. The Plaintiff was the occupier of the said messuage when the distress was made.

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v.
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“ If the Court shall be of opinion in the negative of the question hereunder submitted, judgment shall be entered for the Plaintiff by confession for £4 12s. 6d. and costs. If the Court shall be of opinion in the affirmative of such question, judgment shall be entered for the Defendants with costs.

“ The question for the opinion of the Court is, whether the said distress was legal.”

Wood, for the Plaintiff.

Billing for the Defendants.

STAWELL, C. J., delivered the judgment of the Court :—

The 5th section of the Act empowers the promoters to lay down main pipes, and then call on the inhabitants generally to lay down service pipes; and if the inhabitants fail to lay down the latter, then the promoters may do it, and charge each occupier with the service of the water so supplied to his premises. I think that the laying down of

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the service-pipes and stop-cocks to each occupation is equivalent to an actual supply of water to it. The use of the words "premises so supplied" is corroborative of such view, as shewing that it is the premises that are supplied, wholly irrespective of the individual wants of each owner, and of whether he chooses to use what is so supplied. No doubt expressions are to be found in the adopted English Act which are not applicable to the condition of things here. At the outset that must be so, because the English Statute from which the sections are borrowed applied to cases of private promoters of undertakings carried out by private companies who only supplied water on requisition of those consumers who desired to use it. Here it is a public body; and the object of the Act seems to be only to regard the general good, and disregard particular inconveniences as inconsiderable. An enormous expense was incurred to secure a benefit to the public generally, and if individual persons do not find it convenient to avail themselves of the benefit, any hardship in such case cannot be avoided.

Judgment for the Defendants.

DENNIS v. VIVIAN.

1864.

November 28.

RULE *nisi* for prohibition obtained in vacation from a Judge in Chambers, under the Act 15 *Vic.*, No. 10, sec. 19.

Vivian and party laid a complaint before the Warden and four assessors, at Maldon, against *Dennis* and party for an encroachment on the mining claim of *Vivian* and party. The Warden and assessors decided that *Dennis* and party had encroached. *Dennis* and party appealed to the Court of Mines at Maldon, and at the hearing before the Judge and six other assessors, a verdict was again given for *Vivian* and party. The Judge granted a re-hearing of the appeal, and at this re-hearing before the Judge and six other assessors, the verdict was again for *Vivian* and party. The Judge granted an application for a second re-hearing of the appeal, and fixed a day. *Vivian* and party, contending that the Judge of the Court of Mines has only power under the "*Gold-fields' Act*" to grant one re-hearing of a hearing or of an appeal, obtained this rule *nisi* to prohibit him from going on to the second re-hearing (third hearing) of the appeal.

J. W. Stephen, Wood, and Helm for *Dennis* and party, against prohibition.

Fellows and Holroyd for *Vivian* and party, in support of the rule for prohibition.

Before cause was shewn, a preliminary objection was made that a rule for prohibition ought not to be obtained in vacation from a Judge in Chambers, under the statutory jurisdiction at law, given by 15 *Vic.*, No. 10, sec. 19, when a Court of Equity is sitting, because a Court of Equity can grant prohibition as well as a court of law. The jurisdic-

The Act No. 32, sec. 70, gives the Court of Mines power to grant but one re-hearing of a hearing or an appeal.

Semble, per Stawell, C. J., that under the Act No. 32, sec. 70, the Court of Mines may grant an injunction without there being any suit pending.

A rule for prohibition may be obtained under the Act 15 *Vic.*, No. 10, sec. 19, from a Judge hearing common law business in Chambers in Vacation, during the sitting of a Judge in the equity jurisdiction.

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tion was only given in cases of emergency, and if a Court of Equity were sitting and able to grant prohibition, no emergency existed such as to give jurisdiction to a single Judge in Chambers.

To this it was answered, that the jurisdiction arose wherever the Judge in Chambers in vacation was of opinion that the "special circumstances" of the case required him to exercise such jurisdiction.

The authorities cited were—*Lloyd on Prohibition*, citing *Anon. (t)*, and *Wearing v. Smith (v)*; 5 and 6 *Vic.*, cap. cxxii., sec. 42.

STAWELL, C. J.—Though we use the expression "the urgency clause" or "the emergency clause," yet the Act does not justify the use of those expressions, but seems rather to leave it to the discretion of the Judge. He has jurisdiction if he thinks fit, under the special circumstances of the case, to exercise it. The mere fact of another tribunal being possessed of the jurisdiction does not oust that given by the statute to a Judge in Chambers in vacation.

The rule for prohibition had been obtained on the grounds (1) that the Judge of the Court of Mines had no power under the "*Gold-fields' Act*" to grant more than one re-hearing of a hearing or an appeal; (2) that he had, pending the second re-hearing, granted an injunction to restrain encroachment, without the institution of any suit in the Court of Mines for an injunction.

Against prohibition, it was contended (1) that any number of re-hearings of a hearing or appeal might be
 (t) 1 P. Wms., 476. (v) 10 Jur., 924.

granted by the Judge of the Court of Mines, just as any number of new trials of an action at law, or re-hearings of a suit in equity, can be granted in this Court; (2) that there was no evidence that an injunction had been granted without suit; (3) that an injunction might be granted on an appeal as ancillary to such appeal, and without original suit; (4) that an injunction might in this jurisdiction be granted without suit or appeal.

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Reference was made to the sections of the "*Gold-fields' Act*" giving appeal from the Warden to the Court of Mines, and giving the Judge of the Court of Mines power to grant "a re-hearing" of hearings, appeals, &c.; to the case of the *Great Northern Railway v. Mossop* (*w*); to the Act for the interpretation of Acts; and to the English "*County Court Act*," 9 and 10 *Vic.*, c. 95, sec. 89, giving power to the Judge of the County Court to grant "a new trial."

STAWELL, C. J., delivered the judgment of the Court:—

This rule has been obtained on two grounds—the first that the 70th section of the "*Gold-fields' Act*" gives the Judge of the Court of Mines power to grant only one re-hearing of a hearing or an appeal; and the second, that an injunction was granted without there being any suit pending.

As to the first ground, it is all-important to consider that the Court of Mines is a court dependent solely on the statute for its jurisdiction. Now, courts are not entitled to grant new trials unless expressly authorised so to do by the statute giving them jurisdiction. In this respect, therefore, so far as the power is conferred, we are confined to the words of the Act, and those words certainly do authorise only one re-hearing of the hearing or appeal. Looking at these words, we do not think that they can be reasonably

(*w*) 17 C. B., 130.

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 VIVIAN.

extended to give a power to grant a re-hearing from time to time, as often as the Court of Mines shall think fit; and the extension must be made as far as that, if at all beyond one re-hearing. As far as the policy of the Legislature in this Act can be supposed, too, I think that it would have been most unwise to give to these courts of summary and economical jurisdiction a power to grant unceasing re-hearings and appeals. To say that in this case the finding of the assessors was contrary to the direction of the Judge, and perverse, does not affect the general question; in all cases of provisions of a general nature intended to work a general good, there may be expected to arise some instances of particular hardship. We think that the interpretation enactment does not affect the case—it is not a question whether singular expressions here include several instances, but whether “a re-hearing” means “a re-hearing” as often as you please.

As to the other point, it is not essential, to our judgment, to decide it; but I confess it seems to me that the suit existing in the Warden's Court, and transferred to the Appellate Court would support the issue of an injunction under this section. To grant an appeal without granting a power of restraining encroachment pending the appeal would generally amount to a denial of justice. Moreover, I confess I do not see what suit could be instituted for the purpose of issuing the injunction in it. Without actually deciding this point the strong bias of my own mind is in support of the injunction.

The order *nisi* for prohibition will be absolute. No costs at this stage. I think the injunction is now gone, as it was granted pending the re-hearing, and the re-hearing can never take place.

Rule absolute without costs at this stage.

MELBOURNE AND NEWCASTLE MINMI COL-
LIERY COMPANY (LIMITED) v. HODGSON.
SAME v. BRAYSHAW.

1864.

November 29.

DEMURRER by each Plaintiff to similar pleas in each action.

The declaration was for money due upon calls upon the Defendant as a shareholder in the Company.

The substantial part of the plea demurred to was as follows:—"And that all calls made by the Plaintiffs are made
"and payable under and in pursuance of the provisions of
"the said deed of settlement, and not otherwise; and that
"by the said deed it is provided that the board of directors
"shall call for the payment of the sums of money upon the
"shares held by persons in such company, at such times
"and places as the said directors may determine, by one or
"more public advertisement or advertisements, in one or
"more of the daily newspapers published at Sydney and at
"Melbourne respectively, and in one or more of the daily,
"semi-weekly, or weekly newspapers published at New-
"castle, or by circular letters, as in the said deed provided.
"And the Defendant says that payment of such money as
"aforesaid was not called for by circular letters, and that
"the board of directors of the said company called for pay-
"ment of a sum of money upon the shares held by persons
"in such company, such call being the said call in the said
"first count mentioned, by public advertisements published
"in the newspapers; and that an advertisement of the said

An action was brought in the Supreme Court of Victoria for calls from a shareholder of a company at Newcastle, in New South Wales. The deed of settlement provided that calls should be made "at such times and places as the said directors may determine, by one or more advertisement or advertisements in one or more of the daily newspapers published at Sydney and at Melbourne respectively." The calls were made by one advertisement in the *Sydney Morning Herald* and the *Melbourne Argus*, and the advertisements in

those papers fixed one day for payment of the calls at Sydney, and another for payment of the calls at Melbourne. On demurrer to a plea setting up as a defence that "no time" was fixed, because two different times had been fixed; and that different times could not be fixed for Sydney and Melbourne,

Held, that the advertisements had been given in compliance with the deed; and judgment given for Plaintiff.

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" call was published in the *Sydney Morning Herald*, a newspaper published at Sydney, and in no other newspaper published at Sydney; and an advertisement of the said call was published in *The Argus*, a newspaper published at Melbourne, and in no other newspaper published at Melbourne; and that the time for the payment of the said call named in and determined by the said advertisement in the said newspaper called the *Sydney Morning Herald* was different from the time for the payment of the said call named in and determined by the said advertisement in the said newspaper called *The Argus*; and that, save by the advertisements in the said *Argus* and *Herald* newspapers, and by an advertisement in a newspaper published at Newcastle, no call upon the said shares, or any of them, of which the Defendant was the holder, as in the said first count mentioned, was at any time made by the said company."

Demurrer:—"For that the fact that the time for payment of the calls named and determined in the two newspapers was different, was no sufficient reason why the Defendant should not pay."

Defendant's points:—" (1) That no time is by the deed fixed for the payment of the calls, except the time named in the advertisements in the Sydney, Melbourne and Newcastle papers; and that, as different times were named in the Sydney and Melbourne newspapers, no time at all has been fixed. (2) That the directors cannot fix one time for payment of the calls in Sydney, and another in Melbourne; and that all shareholders must be treated alike, and must all be liable to pay at the same time.

Fellows for each demurrer.

Wood for *Hodgson's* plea.

Harris for Brayshaw's plea.

The authorities referred to were—*The London and Brighton Railway Coy. v. Fairclough* (x), *Newry and Enniskillen Railway Coy. v. Edmunds* (y), *Ex parte Tooke* (z), *Ambergate Railway Coy. v. Coulthard* (a), *Great North of England Railway Coy. v. Biddulph* (b); and 8 and 9 Vic., cap. 16, sec. 21.

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The COURT held that the advertisements given had been in compliance with the deed, as the advertisements were to be in one or more newspapers, and were to name such times and places—the plural number being used as to both the times and the places—for payment of the calls as the directors should determine upon.

Judgment for the Plaintiff.

(x) 2 M. & Gr., 674.

(a) 5 Ex., 459.

(y) 2 Ex., 118.

(b) 7 M. & W., 243.

(z) 18 L.J., Q. B., 344.

IN RE VERDON (TREASURER OF VICTORIA) AND BERRY
(SUB-TREASURER AT BALLARAT), EX PARTE THE
ALBION COMPANY.

December 2.

RULE nisi for *mandamus* ordering the Sub-Treasurer at Ballarat to issue a miner's right "in the name of the Albion "Gold-mining Company Registered." The object was to test whether a company registered under the "*Companies' Act 1864*," is a "person" within the meaning of the Acts requiring that every "person" shall have a miner's right before he can in a Court of Mines assert or defend any interest in a "claim."

A gold-mining company, registered under the "*Companies' Act 1864*," is entitled to a miner's right, whatever may be the requirements of the law as to each individual

miner in such company holding also personally a miner's right as heretofore.

1864.
In re
 VERDON.
Ex parte
 THE ALBION
 COMPANY.

The COURT held that though some verbal inconsistencies might apparently oppose, yet the whole legislation on the subject could only be reconciled by holding that a company was entitled to a miner's right. In so deciding, the Court expressly withheld any opinion on the question, whether in addition to the miner's right to the "company," it was or was not necessary that each individual member of the company should personally hold a miner's right as heretofore.

Rule absolute.

NATIONAL BANK OF AUSTRALASIA v.
 BROCK AND ANOTHER.

Sept. 5, 12.
 December 8.

The *M. C.*
Association
 issued to the
National
Bank of A.
 a guaranty
 policy against
 loss not ex-
 ceeding
 £1,000, by
 the dishonesty
 of *E. L.* while
 in the em-
 ploy of the

ASSUMPSIT on a guaranty policy in writing not under seal, by which the Mutual Confidence Association assured the National Bank against every loss not exceeding in the whole the sum of £1,000, which, during the guaranty, should be sustained by the bank, "by reason or in consequence of the culpable negligence or the want of care" of *Evelyn Lockley* in his employment whilst in the service of the bank. The policy was signed by *James Brock* and

Bank. The policy was subject to the following, among other, "terms and conditions:"—"Immediately upon discovering or having notice that" any act has been committed or default made giving a right to a claim under the policy, the assured "must forward a written statement of all the particulars thereof, so far as the same shall have been then ascertained to the board of directors or the general manager, and this policy shall become absolutely void both as to the then existing and future claims and liabilities if for thirty days after making such discovery or having such notice such statement as aforesaid shall be omitted to be forwarded." The policy was signed by *W. G.* and *J. B.*, as "directors" of the association, was dated November 20, 1862, and was granted under the Deed of Constitution of the Association. This deed was dated July 1, 1862, but it was not executed by *W. G.* until December 2, 1862, and by *J. B.* until January 1, 1863. The *National Bank of A.* having suffered a loss by the fraudulent defalcations of *E. L.*, a "statement" of their claim was sent in to the association. The loss was discovered May 11, 1863; the clerk absconded May 12, leaving his defalcations confessed generally but not ascertained in detail; the "statement" of loss and claim was sent in May 29, when a net loss of £747 0s. 7d.

William Greenlaw, the Defendants, as "directors" of the association, and was dated 20th November, 1862.

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BANK OF
AUSTRALASIA.
v.
BROCK.

The policy contracted that during its subsistence—

"The funds for the time being of the said association shall be subject and liable according to the deed of constitution of the said association to reimburse, satisfy, and make good unto the said assured the full amount of every loss whatsoever," &c.

was stated and claimed; negotiations followed, further particulars were asked for on December 3; and on December 5, the Bank sent in full particulars of the defalcations,

It contained a proviso making the guaranty subject to the terms and conditions annexed; and also a proviso as follows:—

"The funds for the time being of the said association shall alone, according to the deed of constitution thereof, be liable to answer and

making a net loss of £765 13s. 7d., which they claimed. The policy provided that "the funds for the time being of the said association shall alone according to the Deed of Constitution thereof be liable to answer and make good any loss," &c., "and that no member shall in any manner be personally liable or subject to any claim or demand by reason of this policy beyond such funds (which include the amount liable to be called for from him under the said deed)," &c. The 57th clause of the deed declared that all premiums and calls should be applied "in payment of the costs of preparing and perfecting these presents, and printing copies thereof, and in carrying on the business and paying the expenses of management of the association, and after retaining such a sum as the board shall consider sufficient to fulfil the engagements entered into on account of the association, the clear surplus shall form a reserve fund for answering such engagements," &c.

In an action upon this policy to recover losses by the fraudulent defalcations of *E. L.* from *W. G.* and *J. B.*, who signed the policy as "directors," they pleaded:—(1) That they were not "members" of the association at the date of the policy; (2) that a statement of all the particulars of loss was not delivered by the Bank immediately after discovery or notice of the loss; (3) that the funds of the association were not sufficient to satisfy the claim. The verdict was for the Plaintiffs. On rule nisi to enter a nonsuit or for a new trial,

Held—1. That the deed dated 1st July, 1862, reciting that the Defendants were parties, was evidence of their being "members" of the association on that date, although the deed was not executed by one of them till December 2, 1862, and by the other till January 1, 1863.

2. That though the first part of the second "condition" of the policy prescribed delivery of the statement of loss "immediately," yet to give any effect to the last part of the condition it was necessary to hold that the word "immediately" might embrace twenty-nine days; that the acts and conduct of the parties must be regarded in order to ascertain not merely whether the statement was delivered "immediately," but also whether it was a statement of "all the particulars" of the claim, within the meaning of those words as used in the "terms and conditions" of the policy; and that there was evidence on behalf of the Plaintiffs to go to the jury on the issue whether the statement was made "immediately" and contained "all the particulars."

3. That the "funds for the time being" of the association out of which the Plaintiffs might recover did not mean "the balance of funds after deducting all existing liabilities," and that therefore evidence of those liabilities was properly rejected.

1864.
 NATIONAL
 BANK OF
 AUSTRALASIA
 v.
 BROCK.

"make good any loss claim or demand whatsoever under or by virtue of this policy. And no member of the association shall in any way be personally liable or subject to any claim or demand by reason of this policy beyond such funds (which include the amount liable to be called for from him under the said deed), it being one of the original and fundamental principles of the said association that the liability of the individual members shall be limited and restricted to the amount of such funds."

The second of the "terms and conditions," referred to by the policy, was as follows:—

"Immediately upon discovering or having notice that any act has been committed or any default made by or on the part of the employé which would give the right to make a claim under this policy the assured must forward a written notice of all the particulars thereof so far as the same shall have been then ascertained to the board of directors or the general manager and this policy shall become absolutely void both as regards the then existing and future claims and liabilities if for thirty days after making such discovery or having such notice such statement as aforesaid shall be omitted to be forwarded."

The deed of association under which the Mutual Confidence Association was constituted commenced thus:—

"THIS deed made the 1st day of July, A.D. 1862, BETWEEN the several persons whose names are subscribed and seals affixed to these presents (except *W. C. H.*, *D. K.*, and *J. M.*), of the first part, and the said *W. C. H.*, *D. K.*, and *J. M.* (trustees, &c.), of the second part. WHEREAS the several persons, parties hereto of the first part, have agreed to form themselves into an association by the name and for the business and objects hereinafter mentioned, and have agreed to execute these presents as the deed of constitution of the said association."

The first clause was as follows:—

"That the several persons, parties hereto of the first part, will be associated together under the title of the Mutual Confidence Association, for the business and objects hereinafter mentioned subject to the covenants and provisos herein contained from the date hereof until the said association shall be dissolved and the affairs thereof wound up."

The eighth clause of the deed bearing on the terms of the guaranty policies to be issued was as follows:—

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“ Every policy of guaranty issued and every written contract entered into by or on behalf of the association shall contain a clause in such form as shall be approved of by the Board that the funds of the association (which funds shall include the amounts liable to be called for from the respective members during the current year) shall alone be answerable for payment of the amount guaranteed or contracted to be paid or for payment of or making good any loss, claim, or demand whatsoever, the intent of the parties hereto being that the respective members of the association may have their liability limited and restricted to the amount of such funds inclusive of such calls as aforesaid.”

Clause 19 declared that the chairman of the board of directors should when present preside at meetings, and that on all questions where the votes of the members were equally divided the chairman should have a casting vote in addition to his individual vote as a member.

The 23rd clause began as follows:—

“ The several persons following (that is to say), *William Greenlaw*, *B. W.*, *James Brock*, *M. C. McH.*, *R. S.*, *E. M. Y.*, and *R. D.* (all of whom are parties hereto), shall be the first and present directors; and the said *William Greenlaw* shall be chairman of such directors.”

The 57th clause as to the application of the funds and reserve fund was as follows:—

“ All premiums received on account of the association and the money received on account of any call which shall be made shall be applied in payment of the costs of preparing and perfecting these presents and printing copies thereof and in carrying on the business and paying the expenses of management of the association, and after retaining such a sum as the board shall consider sufficient to fulfil the engagements entered into on account of the association, the clear surplus shall from time to time be invested in the names of the trustees (when any names are requisite) in the purchase of Government securities of the colony of Victoria, and none others, and the dividends and income arising from such securities shall be accumulated at compound interest and be invested in like manner until the reserve fund shall at the option of the board amount either to a sum equal to £2 per cent. on the total amount guaranteed by the asso-

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" ciation for the current year, or to the sum of £20,000; and when-
 " soever the reserve fund shall from losses incurred, amount guaranteed,
 " or any other cause, be reduced below the required amount, such fund
 " shall so soon as circumstances will allow be brought up to such
 " amount and so on from time to time. Provided always that it shall
 " be lawful for the board to make any such call as aforesaid either in
 " exoneration or in aid of the reserve fund."

Other provisions of the deed also contemplated membership as essential to eligibility for a directorship. The deed of association was executed by *Greenlaw* on the 2nd December, 1862, and by *Brock* on the 1st January, 1863.

The declaration set forth the material parts of the policy and its terms and conditions. It then continued as follows:—

" And the Plaintiffs aver that they employed the said *Evelyn Lockley*
 " in the capacity and at the place aforesaid from the time of the making
 " of the said policy until the loss hereinafter mentioned; and that
 " after the making of the said policy, and during the continuance of
 " the liability of the said association under the said guarantee, a loss
 " not exceeding £1,000 was sustained by the Plaintiffs by reason and in
 " consequence of the want of honesty, integrity, and fidelity of the
 " said *Evelyn Lockley*, and all things have happened and all times
 " have elapsed necessary to entitle the Plaintiffs to commence and
 " maintain this action, and nothing has happened or been done to
 " prevent their maintaining the same. And although from the time of
 " the said loss until the commencement of this suit the funds of the
 " said association, according to the said deed, were sufficient to reim-
 " burse, satisfy, and make good to the Plaintiff the full amount of the
 " said loss. Yet the Defendants have broken their said agreement in
 " this that the said loss has not been reimbursed, satisfied, or made
 " good to the Plaintiffs."

The Defendants pleaded among other pleas—

" 1. They were not members of the association in manner and form,
 " &c. 2. The agreement or policy was not made or signed by them in
 " manner and form, &c. 4. The Plaintiffs immediately upon discover-
 " ing or after having notice that an act had been committed by the
 " employé which gave the right to make a claim under the policy, did
 " not forward a written statement of all the particulars thereof so far
 " as the same was then ascertained to the board or general manager,
 " and for thirty days and upwards after making such discovery or

"having such notice, such statement as aforesaid was omitted to be so forwarded. 6. The funds for the time being of the association according to the deed of constitution were not as alleged sufficient to reimburse, satisfy, and make good to the Plaintiffs the full amount of the loss in the declaration alleged or any part thereof."

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At the trial, 16th August, 1864, the evidence as to the delivery of the "statement" of losses required by the 2nd "condition" of the policy was that the defalcation of the clerk was first discovered and confessed by him in general terms on the 11th May, 1863; that the clerk absconded on the 12th May, leaving the nature of the loss uncertain; that on the 29th May the bank sent in a statement of the net loss as £747 0s. 7d., without any details, and a claim for that amount. That negotiations then followed, which ended in a request by Defendants on the 3rd December, 1863, for further particulars respecting the defalcations, and in an answering letter by Plaintiffs dated 5th December, 1863, furnishing full details of the defalcations, and making an amended claim of £765 13s. 7d. as the net loss. The verdict was for the Plaintiffs—damages £747 0s. 7d.

Evidence offered by the Defendants of the liabilities of, and the expenses of managing, their institution was rejected by the Judge.

A rule *nisi* was obtained in Michaelmas term to enter a nonsuit, or for a new trial on grounds which appear from the judgment below. September 5.

Michie, Q.C., *Wood*, and *Fellows* shewed cause.

September 12.

Ireland, Q.C., and *Harris* supported the rule.

Cur. adv. vult.

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STAWELL, C. J., delivered the judgment of the Court as follows:—

In this case a rule *nisi* had been obtained for a nonsuit, and also for a new trial, the ground for a nonsuit being that proof had not been given of delivery of a notice, in compliance with the second condition endorsed on the policy. The statement given, it was alleged, did not contain full particulars of the claim, and had not been delivered within the time required by the second condition. The first part of that condition prescribes delivery of the statement "immediately upon discovery," &c., but to give any force to the latter part, it is necessary to hold that the word "immediately" may embrace a period of twenty-nine days. The time required may be much less, but that number of days is the maximum, and circumstances may fully justify the claimants postponing the delivery of any statement for the whole of that period. What circumstances would amount to a justification for the postponement need not be defined. The acts and conduct of the parties must be regarded, in order to ascertain not merely whether the statement was delivered "immediately," according to the meaning of that word as it is used in the condition; but also whether the statement afforded full particulars of the claim. If after the statement had been received the Defendants make offers for compromise, endeavour to settle the claim, recognise the particulars delivered, &c., these acts amount to some evidence that the Defendants were satisfied with the fulness of the particulars delivered and the promptness of their delivery. A promise to pay a bill of exchange is evidence from which a jury may infer that, in the opinion of the person making such a promise, the notice of dishonor was sufficient in form and delivered within due time. The offer of compromise and promise to pay admit a liability, and are inconsistent with the supposition that the person offering the one and making the other could justly claim exemption from liability, because

conditions precedent essential to that liability had not been performed. Such acts, therefore, afford evidence that Defendants in actions like the present are satisfied with the sufficiency of the performance, such as it may have been. We think that in this view there was evidence to go to a jury in support of the issue raised by the fourth plea. The case was so sent to them, and the verdict found ought not on this objection to be disturbed.

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The insufficiency of proof that the Defendants were members of the association forms the first ground for a new trial. The Defendants signed as, and in the capacity of, "directors," a policy purporting to be made by the association. Their so signing does not render them personally liable. But it does not therefore follow that their having acted as "directors" by signing the policy does not in this case afford some evidence of their being also "members." They and others are specially named in the 23rd clause of the deed of constitution as the first and present directors; all of them, it is there stated, being parties to the deed. The 26th clause evidently contemplates membership as essential to eligibility for a directorship. Other clauses of the deed require policies to be signed by three directors, and countersigned by the general manager. Persons acting as directors of such an association are not to be presumed ignorant of the purpose for which they were appointed, and of the qualification necessary for such appointment. Their so acting might be considered evidence of their holding themselves out to the public as duly qualified directors, and consequently of their being members. But the acts of the Defendants, not in initiating the association, but after it had been formed, by being present at meetings of members, deciding on the issuing of policies, and participating in acts which could properly be performed only by members, all afford evidence of membership where the rights of third persons are concerned.

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Added to this, the execution by the Defendants of the instrument of association, which was dated previously to the policy, and contained a recital that the parties signing it had agreed to form a partnership, is evidence of an admission that the fact recited was true. The Defendants, however, urge that the recital must necessarily refer to an agreement made at the time of their having executed, not to one made at the date of the deed. But this argument does not, in our opinion, sufficiently observe the distinction between the effect of the provisions of the deed and the effect of an admission, by a recital in that deed, of the truth of a certain fact. The rule that a deed takes effect not from its date, but from its execution, is not questioned. The operation of the provisions of this instrument is not in dispute. The sound construction of the recital forms, as it appears to us, the sole point in controversy, and that construction should be determined without reference to the effect of the admission made by the recital. The construction of the one, and the effect of the other, are distinct and independent questions. It may be that in this action the admission, as regards third parties, may be of as much importance as the deed itself; but that effect cannot alter the proper rules either of construction or of evidence. A recital in a deed is an admission against the party executing of the truth of the facts recited. What in this case is the fact recited? It is that the parties of the first part signing have agreed to form an association. According to the construction contended for by the Defendants, this recital is to mean that, as each person signed the deed, an agreement was made by that person and the others who had then signed—and by them only—that, in fact, on every fresh occasion a fresh agreement was made. If so, the recital is unmeaning; it refers to an impossibility—namely, that, on the first person signing, he had made an agreement with himself to enter into a partnership; and this agreement, according to such a construction, must have been subsequently varied on every execution by each member.

In an ordinary partnership a new deed is executed on the formation of a new partnership by the introduction of a new partner; but in an association of this kind, a new deed is not executed on the addition of every additional member, and the introduction of such a recital as the present is generally supposed to prevent any questions arising as to the time of the execution of an instrument which cannot of necessity be signed by all the parties at the same moment, and which it is desirable should, as far as may be permitted, speak from its date. Whatever may have been the object of introducing this recital, however, we think that, according to its sound construction, all who execute the instrument of association have actually agreed to become members at its date, or by signing afford evidence of an admission that they did so. This recital consequently, in addition to the presumption arising from the various acts and conduct of the Defendants, is proof of membership to go to a jury.

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As another and distinct ground for a new trial, the Defendants urge that they are answerable only to the amount of the balance of the present funds of the association, after deducting all the present liabilities, and that evidence of those liabilities was improperly rejected at the trial. The policy declares that the funds for the time being of the association shall be liable according to the deed of constitution; and a proviso is also added, repeating that the funds for the time being of the association, according to the deed of constitution, shall be liable, &c. The reference to the deed is, in our opinion, fully satisfied by holding that the funds out of which policies are to be paid shall be formed by contributions from the members in manner and according to the proportions prescribed by that deed. This proviso was inserted obviously to comply with the 8th clause. Its meaning in our opinion is that the members are answerable only for a certain ascertainable amount, and the word "alone" pointedly distinguishes

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between limited and unlimited liability. The policy-holder sees only the policy. By reference to the deed he may, it is true, take, subject to its provisions, but if it was intended to narrow still further the limited liability of the members, unequivocal words should have been used—not a reference in ambiguous terms to another and distinct instrument, made between other and different parties. “Funds for the “time being,” according to the deed, do not in our opinion (giving to the 57th clause all the force it will fairly bear) mean the balance of funds after deducting all existing liabilities. We think, therefore, that the evidence of those liabilities was properly rejected.

On all these grounds the rule *nisi* has in our opinion failed; but as it appears that an error has been committed in the calculation of damages, we think that unless the Plaintiff consents, within a fortnight, to the damages being reduced by £85 8s. 6d., the rule should be absolute for a new trial, on payment of costs; if he does so consent, rule discharged; and as the Plaintiffs after service of the rule *nisi* expressed to the Defendants their readiness to reduce the damages by that amount, in discharging the rule we grant costs.

Rule accordingly.

END OF HILARY TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Victoria,

IN ITS

INSOLVENCY, ECCLESIASTICAL, AND
MATRIMONIAL JURISDICTION.

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Feb. 4, 11.

IN RE THOMAS SMITH, AN ALLEGED INSOLVENT.

ORDER *nisi* for compulsory sequestration. The alleged act of insolvency was that *Smith* departed from the colony, or being out of the colony remained absent therefrom, with intent to defeat or delay his creditors (*a*).

Mr. *Bunny* now moved the order absolute. From the affidavits it appeared that *Smith* was in New Zealand, and had probably gone there with intent to defeat or delay his creditors. He having been forty days absent from his usual place of residence, the petitioning creditor, without obtaining any order for substituted service, inserted a copy of the summons in one of the Melbourne papers, and this was relied upon as sufficient service (*b*).

No person appeared on behalf of the alleged Insolvent.

Cur. adv. vult.

under the circumstances, nugatory; and order *nisi* enlarged, with liberty to the petitioning creditor to apply for an order to substitute service.

(*a*) 5 *Vic.*, No. 17, s. 5.

(*b*) *Vide* 5 *Vic.*, No. 17, s. 25,
and 7 *Vic.*, No. 19, s. 7.

An alleged insolvent being out of the jurisdiction, the petitioning creditor, without obtaining an order for substituted service, advertised the summons under 5 *Vic.*, No. 17, s. 25.

Held, that such advertisements are only proper when the debtor remains in Victoria, and is evading service; that the advertisements in this case were,

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MR. JUSTICE MOLESWORTH:—

A good deal of difficulty occurred in a former case, that of Mr. *Train*, on this point. The question was raised at chambers, and argued, and ultimately it dropped through on account of this very difficulty.

The question is whether the *Insolvent Act*, making certain acts on the part of a debtor acts of insolvency, applies to debtors who are out of the jurisdiction. The 5th section makes one of the acts of insolvency a departing from the colony with the object of defeating creditors. The 25th requires service of the summons to be made in the same way as at common law. That occasioned great difficulty, because at that time there existed no means at common law of serving a person out of the jurisdiction. So it was argued that the 25th section neutralized this portion of the 5th section.

I had occasion also to consider the point in the case of *Emanuel Fox (c)*. In that case I came to the conclusion, though with hesitation, that some means must be found, notwithstanding the 25th section, for giving effect to this portion of the 5th section. So I held that the Court should devise some means of accomplishing that object, by substituted service, or otherwise.

In this case, the creditor, on finding himself unable to make service, merely enlarged the order *nisi*, and, without obtaining any order to substitute service, or leave to deal otherwise with the case, published his advertisements under the 25th section of the *Insolvent Act*. Now, I lately had occasion to hold that those advertisements are only proper when the person to whom they are addressed remains in Victoria, and is evading service within the jurisdiction. So that the advertisements which have been issued are, under the circumstances, nugatory. The

course which I shall now take will be to enlarge the order *nisi* for sequestration to the 3rd of March ; and if the creditor apply in the meantime for an order to substitute service, on affidavits stating who there is in this colony to represent the debtor, and protect his interests, and stating other circumstances proper, I shall then make an order to substitute service. The present application is not sustained.

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Order nisi enlarged accordingly.

IN THE MATTER OF THE PROVIDENT INSTITUTE OF
VICTORIA ; AND
IN THE MATTER OF THE ACT OF COUNCIL,
11 VICTORIÆ, No. 19.

BY an order dated the 26th September, 1862, the estate of this company was sequestrated under the provisions of the 11th Vic., No. 19 (d), and Mr. Courtney was appointed official assignee. Subsequently Mr. Langlands was elected as creditors' assignee, and such election was confirmed by the Court.

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By an order under 11 Vic., No. 19, s. 17, made upon the petition of the official and creditors, assignees of a joint-stock

company, the Chief Commissioner was directed to settle a list of shareholders and advertise the same, with notice that the shareholders therein named were, if they thought fit, to come in before him and dispute their liability in respect of their shares, on a peremptory day to be fixed for that purpose, and that in default of their so coming in, each shareholder would be held liable in respect of such shares. The order also directed a copy of such notice to be served on each shareholder.

Held, that the meaning of the order should be taken to be that an advertisement should be published requiring the persons named in it to appear at the day fixed, and that upon their respectively appearing, they should admit or deny the liability attributed to them, and in the latter case have it ascertained ; but that the advertisement threatening them with being bound by the list, in default of appearance, should be regarded as a *brutum fulmen*, and that no shareholder could be bound until service upon him requiring him to show cause, or his voluntary appearance.

Held, also, that there was no necessity to show service upon all in the list before proceeding in the inquiry as to any.

Difficulties having arisen in the prosecution of the above order, the Court, upon the *ex parte* application of the petitioners, varied and added to the original order in certain respects.

(d) *Vide* 1 W. & W., I. E. & M., 163.

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On the 17th September, 1863, the Chief Commissioner, by a memorandum in writing, under the 11 Vic., No. 19, sec. 17, directed the Assignees to apply for an order for the final winding-up and settling the affairs of the company, and for contribution from the members towards the full payment of its debts, &c. In pursuance of such direction, the Assignees presented a petition to the Court under sec. 17, and an order was, upon the 26th October, 1863, made upon such petition (c).

The Chief Commissioner, proceeding under this order, caused a list of shareholders to be made and advertised, and by

(c) The following is a copy of the order, omitting the formal parts:—
 " This Court doth order that it be
 " referred to the Chief Commissioner of Insolvent Estates at
 " Melbourne, to enquire and state
 " to this Court what sum of money
 " in the whole, and what sums of
 " money as proportionate parts of
 " the whole, or what sum or sums
 " of money from time to time on
 " account will (having regard to
 " the deed of settlement and supplementary deed of settlement of
 " the said company, and the calls,
 " contributions, debt or demands
 " actually paid by the several and
 " respective members thereof, and
 " also having regard to any proceedings in the Insolvent Court)
 " be necessary and proper to be
 " raised by calls or contributions
 " from the respective members of
 " the said company, for the payment and satisfaction of all the
 " debts and liabilities thereof, and
 " also of all the costs of winding-up and settling the affairs of the
 " said company. And in order
 " thereto the parties are to produce before the said Chief Commissioner upon oath, all deeds,
 " books, papers, and writings in

" their custody or power, relating
 " to the matters aforesaid, and are
 " to be examined before the said
 " Chief Commissioner as the said
 " Chief Commissioner shall direct.
 " And the said Chief Commissioner
 " is to cause a list to be made of
 " the names of the several persons
 " whom he shall find to be shareholders of or in the said company,
 " and of the number of shares held
 " by or ascribed or attributed to
 " them respectively. And he is to
 " cause an advertisement to be
 " published in the '*Victoria Government Gazette*,' and such
 " other public papers as he shall
 " think proper, setting forth a copy
 " of the said list, and giving notice
 " that the shareholders therein
 " named are, if they think fit, to
 " come in before him and dispute
 " their liability in respect of their
 " shares respectively. And the
 " said Chief Commissioner is to fix
 " a peremptory day for that purpose. And that in default of
 " their coming in to dispute their
 " liability as aforesaid by the time
 " so to be limited, each of such
 " shareholders will be held liable
 " in respect of such shares respectively, and a copy of such notice

the same advertisement gave notice that he had appointed the 3rd February, 1864, for such shareholders to come in and dispute their liability, in respect of their shares respectively; and stated that in default of their so coming in by the time so limited each of such shareholders would be peremptorily held liable in respect of such shares respectively. On the day named, several of the shareholders appeared before the Chief Commissioner by counsel, and objected to any proceedings being taken until proof was given that all the shareholders in the advertised list had been served with a copy of the above-mentioned notice. The Commissioner declined to decide this point, and at the request of counsel for the assignees, certified to the Court that a difficulty had arisen in the prosecution of the order (f). The Chief Commissioner also made a

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" is also to be served upon each of
" the said shareholders. And in
" case any of them shall come in
" before the said Chief Commis-
" sioner, to dispute their liability
" as aforesaid, the said Chief Com-
" missioner is to appoint a time for
" the consideration thereof, and for
" such shareholders respectively to
" show cause against their names
" being included in the said list.
" And the said Chief Commissioner
" is to be at liberty to enlarge such
" time as he shall think fit. And
" he is also to be at liberty, after
" the expiration of the time for
" shewing such cause, to make a
" separate report, or separate re-
" ports, from time to time as to any
" of the persons whom he shall find
" to be shareholders, and of the
" shares attributable to them re-
" spectively, and of the amount
" payable by any of them; and the
" said Chief Commissioner is also
" to be at liberty to state any
" circumstances relating to the
" matters aforesaid, specially as
" he shall think fit; and in case of

" any difficulty arising in the pro-
" secution of this order, the said
" Chief Commissioner is to certify
" the same to this Court, and
" thereupon such further order
" shall be made as the case may
" require. And any of the said
" shareholders are to be at liberty
" to except to the said Chief Com-
" missioner's general report, or to
" any separate report which he
" may make in pursuance of this
" order, and they and the peti-
" tioners are to be at liberty to
" apply to this Court, as they may
" be advised, whereupon such fur-
" ther order shall be made as shall
" be just."

(f) This certificate was as fol-
lows:—" I certify to this honorable
Court, in pursuance of the order
dated 26th October, 1863, at the
instance of the assignees of the
estate of the said joint stock
company, that on 3rd February
instant, being the peremptory
day fixed by me for the share-
holders of the said company to

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similar certificate at the request of the counsel, for the shareholders who appeared and took the objection.

Mr. J. W. Stephen and Mr. Webb, for the assignees, now moved upon the first certificate for such further order as the case might require.—In this case the assignees are the petitioners for the original order of the 26th October, 1863, and have the carriage of the proceedings under that order. They have obtained a certificate from the Chief Commissioner of a difficulty having arisen, and are now entitled to move *ex parte* for such order as they think necessary to meet the case. There are many shareholders in the list who are either dead, out of the jurisdiction, or insolvent. In such cases we ask for an order dispensing with service; as also in cases where the assignees can satisfy the Chief Commissioner that after due diligence they have been unable to effect service. The time originally fixed by the Chief Commissioner for the shareholders to show cause, having, by reason of the technical objection raised, lapsed, it will be necessary to give the Commissioner power to fix a time afresh for those who have been served to come in and show cause; and also to fix a future time or times for showing cause by those who may hereafter be served.

MR. JUSTICE MOLESWORTH.—As I understand a motion founded upon the certificate granted to the shareholders is put

“come in to dispute their liability, a difficulty arose in the prosecution of the said order by reason of the question being raised whether, upon the showing cause by any of the shareholders, or at any time previously, the assignees are bound to prove service of the notice mentioned in the said order upon those who appear to object to service, and upon all the persons named as shareholders in the list referred to in

“such notice respectively; also, upon its appearing that the assignees had not hitherto been able to effect service upon some of such persons, whether the time can be enlarged or extended for such persons, when served, to come in and dispute their liability as shareholders.

“W. B. NOKL,
“Chief Commissioner of Insolvent Estates.”

in the list, I will reserve expressing any opinion upon this application, or making any order upon it, until I have the benefit of any discussion which is to take place upon that motion.

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Mr. Moore, Mr. Holroyd, and Mr. Lawes were now heard upon the certificate of the Chief Commissioner, granted at the instance of the shareholders.—No further proceedings can be taken under the order of the 26th October, until it be shown that all the alleged shareholders in the list, advertized by direction of the Chief Commissioner, have been served. Several of the shareholders now appearing, and who appeared before the Commissioner, have not been served, and they cannot be called upon to show cause until service upon them is shewn. Their appearance is not a waiver of service, for they may appear to object to service.

The assignees did not appear upon this application.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH:—

February 11.

In this case, on the 26th October, 1863, I made an order, copied from one made by Lord Langdale, as Master of the Rolls, in *In re Forth Marine Insurance Company (g)*, after great consideration. [His Honor read the order, *vide ante*, p. 4, n.] The learned Commissioner, proceeding under this order, caused a list to be prepared and advertised as directed by it, fixing the 3rd of February as the peremptory day for the shareholders to come in. It appears by the Commissioner's certificate, made at the instance of the assignees that a difficulty arose in the prosecution of the order. [His Honor read

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the certificate, *vide ante*, p. 5, n.] The Commissioner also signed a certificate nearly the same as the foregoing, at the instance of some shareholders who appeared to urge the above objection to his proceeding.

Counsel on behalf of the assignees moved, as on the first certificate, for an order *ex parte*, explaining or varying the above order, so as to make it practically effective by dispensing with the necessity of service upon persons out of the jurisdiction, insolvent, or dead, also where service is very inconvenient; also, by allowing the Commissioner to adjourn the proceedings after the peremptory time for showing cause, and to fix an enlarged time for showing cause.

On the next day, counsel on behalf of various persons, whose names appeared as shareholders in the advertisement, came to urge before me, as they had urged before the Commissioner, that, under the terms of the order, the Commissioner could not proceed in the inquiries as to them until service was shown upon all the shareholders; and some of them to urge that they had not been served themselves; and I have had the benefit of their arguments.

I must confess that I am a good deal puzzled in putting a meaning upon my own order, as I do not see why it should direct an advertisement as a means of summons to all persons in a list, and at the same time that they should be served otherwise with the notice. I think the meaning of the order should be taken to be that an advertisement should be published requiring the persons named in it to appear at the day fixed, and that upon their respectively appearing, they should admit or deny the liability attributed to them, and in the latter case have it ascertained; but I think the advertisement threatening them with being bound by the list, in default of appearance, should be regarded as a *brutum fulmen*, and that the order does not properly purport so to bind them. I think no shareholder can be bound until service upon him requiring

him to show cause, or his voluntary appearance. The advertisement has thus the effect of producing voluntary appearances, and entitling the parties so appearing to be heard as to their own liability; and, that being established by admission or adjudication, as to the liability of others.

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But I do not concur in the preliminary objection taken by some shareholders, as to the necessity of showing service upon all in the list, before proceeding in the inquiry as to any. I also think that it is competent for the Commissioner, under the order, now to fix a time for the consideration of the case of any shareholder in the list. I do this in analogy to the practice upon creditors proving successively in insolvency, and creditors and next of kin proving under decrees to account, and that after the period fixed for coming in by advertisements.

There are various points urged by the counsel for the assignees, as to which I think it well, for its proper working, that the order should be varied. I think I can, and ought, to act as on the *ex parte* motion of the assignees seeking direction upon a difficulty in the working of the order, certified by the Commissioner, and seeking other directions from difficulties suggested by themselves.

The other parties moving as alleged shareholders insisted in fact, both before the Commissioner and me, that nothing could be done under the order as matters stood, and some only appeared under protest, as not being duly served. I feel some embarrassment as to the best mode of dealing with them, but think I shall least complicate the matter, and best enable them to take the opinion of the full Court, on appeal from my decision, if they wish to do so, by refusing to make any order on their application.

I shall order that the Chief Commissioner of Insolvent Estates, in proceeding under the order of October 26th, shall

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proceed to inquire, at such times as he may appoint, into the liability of all persons appearing as shareholders in the list already made by him, who shall appear to dispute their liability, within a term to be limited by him, and notified by advertisement, and that he shall hold all persons who have been duly served with the notice directed by the order, before the 3rd day of said February, and shall not appear to show cause within the time so to be limited, liable according to the said list, unless under special circumstances he shall receive their appearance afterwards. Order, that the assignees proceed to serve all persons appearing on the said list, not duly served with notice before the 3rd day of February, save as hereinafter mentioned, with a similar notice to show cause before a time to be fixed by the Commissioner; but order that the said Commissioner may be at liberty to dispense with attempts to serve such notice, when it shall appear to him that the persons named in the list are respectively out of the jurisdiction, insolvent, dead, or to be served only with undue expense or inconvenience. Order that all persons who shall have appeared as shareholders before the Commissioner, and signed a written admission deposited in his office that they are liable in respect of any specified number of shares, shall be at liberty to procure such similar notice to show cause to be served upon any person appearing on the said list as to whom the Commissioner shall have dispensed with service by the assignees, and shall also be at liberty, with the consent of the Commissioner, to serve any persons in the said list whom they allege to be shareholders to a greater amount than appearing therein, with notice calling upon them respectively to show cause why they should not be charged as shareholders, or to a greater amount than they appear charged in the said list; and that the Commissioner shall proceed to adjudicate upon the liabilities of persons served with such notices respectively, as upon the liabilities of persons brought in by notice from the said assignees; and that the Commissioner be at liberty to ascertain the reasonable costs and expenses of such notices, and of inquiries consequential thereon, incurred by the persons serving the same;

and if he considers them fairly entitled thereto, having regard to the benefit to the estate arising from their exertions, to allow them such costs and expenses as a deduction from their own liabilities as shareholders in the said Company.

Order accordingly.

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IN RE JOHN V. BRADLEY, AN INSOLVENT.

PETITION by the official assignee of *Bradley's* estate in respect of a proof by *M'Ewan & Co.* of a debt of £647 14s. 6d. in this estate, admitted by the Chief Commissioner under the following circumstances.

An adjourned meeting for proof of *M'Ewan's* debt was fixed for eleven, a.m., on the 3rd February, 1864. In the list of that day the case was the thirty-fifth in order; but in the actual proceedings of the day the case was, as alleged in the petition, called on out of its turn. The official assignee then stated that the proof was opposed, but that his solicitor with the necessary papers was not in attendance. *M'Ewan* and his counsel were in attendance, and urged on an immediate hearing, and the Chief Commissioner on ascertaining that the proof was on a judgment, thought there was no good to be answered by postponement. The official assignee asked leave to examine *M'Ewan*, but, for the same reason, was refused, and the proof was admitted. Thereupon *M'Ewan* and his counsel left the court. In a few minutes afterwards the official assignee's solicitor arrived, and the Chief Commissioner was asked to re-open the matter, but refused.

debt as proved, and afterwards refused to re-open the matter. The official assignee petitioned, praying that the proof might be expunged, and the Chief Commissioner be directed to re-hear the matter. Petition dismissed with costs.

Feb. 18, 25.

The Chief Commissioner is the judge of what degree of delay and indulgence is to be given to persons appearing before him, and the Court has no jurisdiction to control his movements in those points. If he decides erroneously, because too hastily, an appeal is the proper remedy.

The Chief Commissioner received proof of a debt under circumstances amounting to a surprise upon the official assignee, admitted the

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The prayer of the petition was,—“That the said proof may be expunged from the said proceedings, and that the Chief Commissioner may be directed to rehear the matter; or that your Honor will make such other order in the premises as justice requires.” The notice served by the Petitioner on *M'Ewan & Co.* was of a petition for an order “to expunge the proof,” &c.; “and that the Commissioner may be directed to re-hear the matter.”

Mr. *Billing*, for *M'Ewan & Co.*, raised two preliminary objections—firstly, that the application should not have been by petition to expunge, but by appeal; secondly, that it should have been, not by the official assignee (unless on the direction of the creditors generally, or of the Commissioner), but by any creditor aggrieved and objecting. On the first point, the language of the 36th section of the 5th Victoria, No. 17, was criticised, and the case of *Henderson & Sons* (*h*) cited. On the second point, the case of *Ex parte Groom* (*j*) was cited.

His Honor declined to dispose of the case on these points alone.

Sir *G. Stephen* in support of the petition. Firstly, the Chief Commissioner is but an executive officer of the Court; as such his discretion is, in all instances, subject to the review and correction of the Court; and, in this case, the Commissioner evidently exercised so bad a discretion, that he should be directed to review the matter on such terms as to costs as the Court shall think proper.

Mr. *Billing*, *contra*. The discretion of the Chief Commissioner as to the practice of his own Court will never be interfered with in particular cases, although the Court may still possess and use the power to interfere by general rules. Even if the Court would in some cases interfere, still the particular discretion exercised in this case was well and properly exercised.

Mr. JUSTICE MOLESWORTH :—

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In my opinion, as at present formed, the Chief Commissioner is not such an executive officer of the Court, in respect of the matter under discussion, as that his discretion may be reviewed in the same way that the discretion of the Master in Equity perhaps might. The Commissioner has judicial functions, in the exercise of which he is independent to a certain extent; and subject only to appeal, in a certain way prescribed by the Act. As to the person entitled to appeal, and manner of appealing, the Act is so framed that I am somewhat embarrassed in putting a construction upon it.

Mr. *Billing*. The terms of the prayer of the petition and of the notice, are confined to directing a re-hearing by the Commissioner, which the Court has no jurisdiction to order. The application to this Court should have been by way of appeal from the decision of the Chief Commissioner.

Sir *G. Stephen* in reply.

Cur. adv. vult.

Mr. JUSTICE MOLESWORTH :—

February 25.

The 30th section of the *Insolvent Act*, 5 Vic., No. 17, provides "that every creditor shall prove his debt by affidavit or otherwise, to the satisfaction of the Commissioner, who shall admit any debt, or reject the same as not proved, subject to appeal from his decision to any Judge of the Supreme Court, and it shall and may be lawful for the said Judge, on the application of any party interested, finally to admit or reject any debt admitted or rejected by the said Commissioner."

The foundation of the present application is, that the Chief Commissioner received proof of a debt under circumstances

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amounting to a surprise; the facts, as alleged, having been—that there was a long list of meetings for proof of debts; that this particular meeting was accelerated and taken out of its turn; that the official assignee attended, and endeavored to get delay till his solicitor should arrive with the necessary papers, and that the Chief Commissioner, under the circumstances, refused delay and admitted the proof, and afterwards refused to re-open the matter.

The decision of the Chief Commissioner is subject to appeal, under the Act, but not, I think, to revision of this kind. He judges his own times and hours in the conduct of cases in his own Court, and what degree of delay and indulgence is to be given to persons appearing before him; and he seems to me in such matters to exercise as good a discretion as any one. I do not think I have jurisdiction to control his movements in those points. If he decides erroneously, because too hastily, an appeal is the proper remedy. I do not wish by this to encourage the official assignees in appeals, as I have already intimated a doubt which I entertain as to the propriety of their interference at all; but any creditor who thinks himself aggrieved may appeal. So no remediless injury is done by admitting the proof as it at present stands. Upon the whole, I think I must refuse the present application, and with costs.

Petition dismissed, with costs.

EX PARTE SAMUEL T. STAUGHTON AND GEORGE
C. DARBYSIRE, TWO OF THE EXECUTORS OF SIMON
STAUGHTON, DECEASED,

IN RE CYRUS HEWITT, AN ALLEGED INSOLVENT.

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March 3, 7,
16.

ORDER nisi obtained on the petition of two of the three executors of *Simon Staughton*, deceased, for the revival under the *Insolvent Act*, 5 Vic., No. 17, sec. 28 of an order nisi for sequestration of the estate of *Cyrus Hewitt*, obtained by *George John Watson* on the 19th January, 1864, but discharged on the non-appearance of *Watson* to support it on the 4th February, 1864, the day appointed for hearing it.

A petition under 5 Vic., No. 17, s. 28, for revival of a sequestration alleged default of the petitioning creditor, and also collusion between him and the Insolvent as to the discharge of the rule nisi for sequestration; but no such collusion was proved.

Held, that proof of default alone was sufficient, without collusion, and that the allegation in the petition of collusion was to be regarded as mere surplusage.

It is not necessary that a creditor

The original petition of *Watson* alleged that *Hewitt* was indebted to him in the sum of £177 18s. 6d. for costs by a rule of Court ordered to be paid by *Hewitt* to *Watson*; that a writ of *fi. fa.* was issued upon the rule; that *Hewitt* was required to satisfy the rule and writ, or point out sufficient disposable property to satisfy the same, but did not either satisfy or point out; that the Sheriff did not find sufficient disposable property to satisfy the rule and writ, and returned the writ *nulla bona*; and that *Hewitt* thereby committed an act of insolvency.

The present petition alleged that the Petitioners, with one *F. W. Armitage*, now out of the jurisdiction, were executors of the last will of *Simon Staughton*, deceased; that *Hewitt* was, prior to the 19th January, 1864, and still remained, in-

seeking to revive a sequestration, should prove that the original petitioning creditor's debt was a good one, although he must prove the insolvency in other respects, and prove his own to be a good petitioning creditor's debt.

All executors must join in a petition for the compulsory sequestration of the estate of a debtor to their testator's estate. *Treasure v. Jones* considered, and held not binding in Victoria.

A judgment debtor, when called upon to satisfy the debt, or point out property to satisfy it, must, in order to avoid the commission of an act of insolvency within the 5 Vic., No. 17, s. 5, either satisfy, or point out property within the circuit district of the Sheriff to whom the writ of execution is addressed.

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debted to the Petitioners and the said *Armitage*, as such executors in the sum of £598 14s. 6d., for goods of their testator sold and delivered by them to *Hewitt*; that by order *nisi* of the 19th January, 1864, made upon the petition of *Watson* the estate of *Hewitt* was placed under sequestration until the same should be adjudged to be sequestrated, or the said petition be discharged according to law; and that by such order the 4th of February then next was appointed for *Hewitt* to shew cause why his estate should not be sequestrated; that although *Hewitt* duly appeared on the 4th February, *Watson*, colluding with *Hewitt*, made default in appearing, so that in consequence of such default the order *nisi* was superseded, and the petition of *Watson* dismissed: wherefore the Petitioners prayed that the said sequestration might be revived.

The order *nisi* obtained upon the above petition ordered that the sequestration of the estate of *Hewitt* be revived; and appointed the 3rd March, 1864, for *Hewitt* to shew cause why his estate should not by sentence of the Court be adjudged to be sequestrated for the benefit of his creditors.

Mr. *Holroyd* and Mr. *Lawes* for the alleged insolvent took two preliminary objections:—First,—The petition is in the name of the wrong parties. It alleges a debt to the three executors of *Simon Staughton* for goods sold and delivered by them to *Hewitt* since the death of the testator. The petitioning creditors' debt must be one for which an action at law could be maintained in the name of the petitioner. *Watson v. Humphrey* (*k*), *Hope v. Meek* (*l*). Here the two petitioning creditors could not sue at law without joining the third, nor can they support a petition in insolvency. *Buckland v. Newsom* (*m*). In the case of a debt due to the testator, one executor only may petition, but not in the case of a contract with the three executors after the death of their testator. Here, having petitioned

(*k*) 10 Ex., 781.

(*l*) *Ib.*, 829.

(*m*) 1 Taunt., 477.

as executors, they should all join. *Brassington v. Ault* (n), *Doe d. Stace v. Wheeler* (o), *Webster v. Spencer* (p).

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Secondly,—The original proceedings by *Watson* were insufficient, the debt on which his petition was founded being insufficient to base a sequestration. This debt does not comply with the two necessary *criteria* of a petitioning creditor's debt—namely, that such debt be a legal debt which can be recovered by an action at law; and one the recovery of which at law will not be restrained in equity. *Ex parte Hillyard* (q). Now an action cannot be brought on such an order for costs as this. *Gregory v. King* (r), *Carpenter v. Thornton* (s). Taxed costs under a rule of Court do not constitute a good petitioning creditor's debt. *Ex parte Stevenson* (t).

Mr. *J. W. Stephen* and Mr. *Webb*, in support of the order, *contra*. As to the first objection, although the rule at law is that all executors must join in an action, that is not so in bankruptcy. One of three executors may alone be a good petitioning creditor, on a debt due to his testator. *Shelford on Bankruptcy*, p. 134. *Treasure v. Jones* (v). This applies also and equally with reference to debts contracted after the testator's death, with the executors, if the money, when recovered, would be assets in the estate; for where the cause of action arises after the death of the testator, the executors may sue as such, *Aspinal v. Wake* (w), and an executor may take out a commission of bankruptcy before he has obtained probate, *Ex parte Paddy* (x), *Bullen and Leake's Pleading*, 2nd ed., p. 130, *Williams on Executors*, pp. 787, 1695. In either case, whether the debt accrue before or after the death, the executors, if suing at law, must all join. *Treasure v. Jones*, however, establishes that in the case of a debt due before the death, one of several executors may be a good

(n) 2 Bing., 177.

(o) 15 M. & W., 623.

(p) 3 B. & Ald., 360.

(q) 2 Ves., 407.

(r) Ante, Vol. I., Law, 92.

(s) 2 B. & Ald., 52.

(t) Mont. & Mac., 262.

(v) 1 Selw., N.P., 265.

(w) 10 Bing., 51.

(x) 3 Madd., 241.

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petitioning creditor in bankruptcy ; and by parity of reasoning, in the case of a debt due after the death, one of several executors will be a sufficient petitioning creditor.

As to the second objection. The costs due to *Watson* under the rule of court constitute a sufficient petitioning creditor's debt. *Ex parte Smith* (y). Under the *Insolvent Act*, sec. 28, all that is meant is a petitioner's debt *prima facie* sufficient. *Watson's* rule *nisi* for sequestration was discharged on a compromise between *Hewitt* and *Watson* ; on such compromise *Watson* was paid, and he did not appear to support his rule, which was thereupon virtually discharged as "by consent." The present petition is for revival of that sequestration, under sec. 28 of the 5 *Vic.*, No. 17, on the statutory ground that *Watson*, colluding with *Hewitt*, the sequestration had, in consequence of the consent or default of the petitioning creditor, been superseded. Upon such a petition it is not open for *Hewitt*, after his compromise and consent, to contest the sufficiency of *Watson's* debt.

Mr. *Holroyd* in reply as to these objections.

Mr. JUSTICE MOLESWORTH.—I shall reserve the consideration of these points, and proceed with the case.

Evidence was then gone into in support of the petition. The evidence of *Burns*, the sheriff's officer, in support of the alleged act of insolvency, was that he saw *Hewitt* and asked him to pay the costs due to *Watson* on the rule of court. *Hewitt* said he had no money. *Burns* asked him to point out property, &c. *Hewitt* said he had an interest in a mine or mines at *Steiglitz*. *Burns* said, "I cannot recognize that; it is out of our district." *Hewitt* then said he had a valuable brood mare on *Watson's* station. *Burns* made inquiry as to

the mare, but never saw her. He was, however, informed that she was of little value, and not worth going up to the station to fetch.

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Mr. *Holroyd* and Mr. *Laves* submitted, by way of nonsuit points, that there had been,—Firstly, no proof of an act of insolvency by a failure to pay *Watson's* debt, or to point out property to satisfy it. Secondly, no proof of the collusion, which it was necessary under 5 *Vic.*, No. 17, sec. 28, to allege, and which the petition did allege, between *Watson* and *Hewitt*, as to the discharge of *Watson's* rule *nisi*. Upon the point of collusion were cited (in order to show that if the charge of fraud failed, no other ground of relief could be called in aid) *Wilde v. Gibson* (z), *Marquis of Donegal v. Greig* (a); and as to the technical import of the word “collusion,” *Tomlin's Law Dictionary*.

Counsel for the petitioning creditors were not called on upon these points.

MR. JUSTICE MOLESWORTH.—I have been called upon in this case to, as it were, nonsuit on the ground of insufficient evidence.

The first objection is as to the conduct of the sheriff's officer, who called on *Hewitt* to pay the debt or point out property to satisfy it. *Hewitt* answered that he had a share in mines at *Steiglitz*, and a brood mare, I don't know where. I consider that it is not enough to defeat this application that he should prove himself simply to have said that; he must give some evidence to show his statement to have been true. But it also appears here that the statement so made related to alleged property in another district, and in a bailiwick in which it is said—and for the purposes of this argument I assume it to be correctly so said—that the officer had no jurisdiction to seize the pro-

(z) 1 H. L. Cas., 605.

(a) 13 Ir. Eq. Rep., 44.

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perty, even if he had seen it. The Act of Insolvency which the 5th Vic., No. 17, contemplated was a person being called upon by an officer to pay a debt which was payable to that officer as the holder of a writ of *fi. fa.*, or to point out property to satisfy the debt, and the party so called upon not satisfying or pointing out. Now the duty of requiring the debtor to point out must of necessity be performed in the district where the person is who is required to pay or satisfy. If that person has the misfortune to be asked to pay or satisfy where he has no property to do it when so asked, that is his misfortune, just as much as if his property were in England or anywhere else incapable of being immediately realized. If in the former state of the colony, a person at Sydney having immense property in Port Philip, had been asked personally in Sydney to pay or satisfy a debt, would it have been enough for him to say he had property in the district of Port Philip, when the sheriff's officer of Sydney could not seize property in Port Philip? Now, since the division of the colonies, I cannot say that the express words of the Act are to be virtually annulled as they would be if on a sub-division of the districts the Act has ceased to be applicable in any way, unless by the issue of contemporary writs into each district of the colony? It necessarily follows from such sub-division, that a debtor becomes liable to be made insolvent with reference to a narrower district than before such sub-division. That inconvenience, at the most, imposes on him the necessity of realizing his own property to a certain extent; and he surely can realize his property as easily as the sheriff's officer. He must make his property available to such an extent as to meet his just liabilities, or be liable to be made insolvent in any division where he may be without the means of meeting them.

The next objection is that the petitioning creditor now seeking to revive the sequestration obtained by *Watson* has based his case on alleged collusion of *Watson* with *Hewitt*, and has failed to prove it. The language of the Act is—"If such order," that is the order for sequestration, "shall be

superseded in consequence of the consent or default of the petitioning creditor or creditors, or his or their collusion with the insolvent, it shall be lawful for the Supreme Court . . . to order that the said sequestration shall be revived." Now I think that the first word "consent" relates to an express consent; the second word "default" relates to not appearing to enforce the order *nisi*; and the third member of the sentence, "collusion," applies to a case in which there is all the semblance and appearance of supporting the order, but only a colorable and not a real support. The present petition combines both default and collusion, but I do not think that renders it necessary for the petitioner to prove all he has so combined. I think it sufficient if he has proved a mere default; that the petitioner on the return of his rule *nisi* did not appear in support of it, whereby it was discharged. I put my decision solely on the ground that I am of opinion that default alone is sufficient without collusion, and that the addition in the petition of the word "colluding" is to be regarded as mere surplusage; that although conveying an imputation, and in some sense an unwarrantable imputation, yet the default being sufficient, the addition of the word "colluding" as matter of aggravation, does not render it necessary to prove collusion. In my opinion, the original proceeding by *Watson* having been dismissed by the default of the petitioning creditor, that is sufficient to sustain the present application for a revival of the sequestration. I think there is evidence—a *prima facie* case—at least sufficient to prevent a nonsuit, and I must therefore put the alleged Insolvent to his case in defence.

Mr. *Holroyd* asked for a postponement. He desired to call a witness, now serving on a jury in the other Court, to prove that the property of the Defendant at *Steiglitz* was more than sufficient to have satisfied the debt.

Mr. JUSTICE MOLESWORTH.—If you are prepared to give the evidence now I shall take it. My own impression is against its efficacy, and that being so I do not think I should be justified

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in putting the parties to the expense of an adjournment. I therefore do not think I ought to grant the application. I must consider further the two preliminary objections already reserved.

Cur. adv. vult.

March 16. MR. JUSTICE MOLESWORTH :—

This was an order *nisi* obtained by a creditor to revive a previous order *nisi* for sequestration obtained by another creditor, but which had lapsed. There were various points which I have already disposed of in the course of the argument, but the case stood over upon two preliminary objections. One of these was that the debt upon which the original order *nisi* was obtained was not a good petitioning creditor's debt, within the meaning of the Act. There was a rule *nisi* obtained by *Hewitt*, the alleged insolvent, to set aside an award, and that rule was subsequently discharged with costs, and the question has been raised whether that liability of *Hewitt* to those costs constituted a good petitioning creditor's debt. I do not think it necessary to consider the materiality of that question, for under the section upon which we are now proceeding, I think it is not necessary that the creditor seeking to revive should prove that the original petitioning creditor's debt was a good one, although he must prove the insolvency in other respects, and prove his own to be a good petitioning creditor's debt. In fact, one of the alternatives in which the sequestration may be revived is where the original petitioning creditor's debt is insufficient; and therefore, although the first petitioning creditor's debt may not be a good one, I think another creditor, having a sufficient debt of his own, may revive.

Another preliminary objection is that the present proceeding is taken by two only of three executors of a deceased person, the three having taken out probate. The authority for that

relied upon by the Petitioners' counsel is *Treasure v. Jones*, in 1 Selw., N.P. reported, as extracted from M.S.S. notes of a decision pronounced in the 25th *Geo.* III. Generally speaking, in all acts by executors seeking relief, whether at law or in equity, it is necessary that all executors who have proved should join; and it would be somewhat anomalous if a single executor could sue out an order *nisi* in insolvency. The only authority for that is *Treasure v. Jones*. That has been adopted in several text books in England as law, but has not been corroborated by any more recent decision. I have looked to the English Statutes of Bankruptcy anterior to the 25th *Geo.* III., to see how far that decision is sustainable upon the particular language of those Acts, and how far that principle ought to be extended to our Act here. I find that in the 13th *Eliz.*, cap. vii., which was the first permanent Act on the subject of bankruptcy, all that is said as to the petitioning creditor is that the judges shall proceed on a complaint in writing. It does not say by whom made, or even that it must be by a creditor. The Act 21st *Jac.* I., cap. xix, referring to the 13th *Eliz.*, directs that it and the other Bankrupt Acts shall receive a liberal construction in favor of creditors. I have no details of the argument upon which the decision of *Treasure v. Jones* was based, but I think it must have been upon the sections to which I have adverted. Now our Act requires that the creditor shall petition. It does not directly apply to the case of executors and their proceeding at all is, I apprehend, under the 19th section, which provides "that every privilege and power given to any creditor shall be given to every person legally vested with the administration of the estate of any person deceased, provided that in reckoning the number of votes, &c., any persons in whom the joint administration of any estate is vested as aforesaid shall be entitled to only one vote, and shall be considered as one person." This latter clause as to the vote seems to contemplate that all executors shall join, but at the same time shall have only one vote. On the whole, I think that this clause would rather indicate that where personal representatives are petitioning creditors, they must all join.

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I think there is no reason why in this country I should consider that decision of *Treasure v. Jones* to be binding, and I therefore consider it necessary that all executors should join in a petition for compulsory sequestration, and for that reason I think the present order should be discharged. I shall, however, discharge it without costs; both because the point is novel, and because there has been a good deal of litigation in the case upon subjects upon which the alleged insolvent has failed.

Order discharged, without costs.

EX PARTE JAMES HUGH WHITE, TRADING UNDER THE
 STYLE OF J. H. WHITE & CO,

March 31,
 April 7.

IN RE CYRUS HEWITT, AN ALLEGED INSOLVENT.

The debt of a creditor seeking to revive a sequestration under 5 Vic., No. 17, s. 28, is sufficient if incurred prior to the order for sequestration, and need not have been incurred prior to the act of insolvency relied on.

THIS was an order *nisi* (obtained subsequently to the discharge of the order *nisi* in the last case) for the revival of the sequestration of *Hewitt's* estate. The allegations of the petition, except as to the debt of the present petitioning creditor, Mr. *White*, and that it did not allege "collusion" between *Watson* and *Hewitt*, were the same as in the petition in the last case.

Mr. *Fellows* and Mr. *Holroyd*, for the alleged insolvent, took several preliminary objections. (1) The original petitioning

Where two of three executors have applied under 5 Vic., No. 17, s. 28, for a revival of a sequestration of the estate of a debtor to their testator's estate, and such application has been refused on the ground that two out of three executors were not entitled so to apply; such refusal is no bar to a subsequent application by another creditor for revival.

When a judgment debtor is required, under 5 Vic., No. 17, s. 5, to "point out disposable property," the mere assertion by him that he has property is not a sufficient pointing out; and the person who relies upon such assertion must afford evidence of its truth, and not merely prove that he made such a statement.

Upon an application under 5 Vic., No. 17, s. 28, to revive a sequestration, the original petitioning creditor need not be served with notice of the application.

creditor, *Watson*, should have been served with notice of this application to revive the sequestration; *Ex parte Ward* (b). He may not have made default in moving the order absolute, but may have been paid his debt, and therefore ceased to prosecute the order *nisi*. (2) It is not competent to the present petitioning creditor to revive the sequestration, inasmuch as an attempt to revive it has already been made by another creditor, and failed. The Act only provides that the sequestration may be revived "upon the application of any other creditor or creditors whose debt or debts may amount to the value hereinbefore provided," without saying "from time to time," or words to that effect. (3) The act of insolvency is alleged to have been committed on the 12th January. The present petitioning creditor's debt is only sworn to have been due prior to the 19th January, whereas it should have been sworn to be due prior to the alleged act of insolvency; *Cowie v. Harris* (c), *Moss v. Smith* (d), *Re Charles* (e). 5 Vic., No. 17, s. 14, also shows this to be the intention of our Insolvent Act.

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Mr. *J. W. Stephen* and Mr. *Webb*, for the present petitioning creditor, *contra*.

Mr. *Holroyd*, in reply.

HIS HONOR reserved the consideration of the preliminary objections, and the hearing of the case was proceeded with. The evidence in support of the alleged act of insolvency was the same as that adduced in the last case.

MR. JUSTICE MOLESWORTH :—

In this case several preliminary objections were taken, which I reserved. The first objection is that the present application

(b) 3 M. D. & D., 294.

(d) 1 Campb., 489.

(c) Moo. & M., 141.

(e) 14 East., 196.

W. W. & A'B. VOL. I.—I. E. & M.

D

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is brought forward without notice to the original petitioning creditor, and that is based upon the case of *Re Ward*. The proceeding there was not at all the same as the proceeding now in question. In England, in some instances, the original petitioning creditor was allowed his costs; in others he was disallowed them; and on any subsequent application to substitute another petitioning creditor, the original petitioning creditor had that question, amongst others, to agitate, as to the terms upon which the new creditor should be let in. In the present instance I do not see what interest the original petitioning creditor has to protect. I do not see how he can be damaged by the present order being made, although he may probably be benefited by it. It is said he may have effected a compromise which will be disturbed by this proceeding; but I am not to presume that he has made a compromise contrary to the spirit and the express provisions of the *Insolvent Act*. I therefore do not think this objection can be sustained.

Then it has been urged that this application cannot be entertained because an application by two of three of the executors of Mr. *Staughton*, with a similar object, has failed. That fact does not appear upon the evidence before me, but I shall give judgment assuming it to exist; and give liberty to the Insolvent, if requested, to add evidence of it, so as to remove any formal difficulty, if he intends to take any further opinion upon the subject. That former application was refused on the ground that two out of three executors were not entitled to apply. Therefore, this is not the application of a second creditor seeking to revive, but it is the application of a creditor seeking to revive notwithstanding the abortive attempt made by persons who, I held, were not creditors entitled to take up the proceeding. I therefore do not think the previous attempt having failed is any bar to the present proceeding.

Then it is said that this petitioning creditor's debt should be one due before the act of insolvency relied on. That is

founded on the English Act. The language of the Act under which the present application is made is "upon the application of any creditor or creditors whose debt or debts have been incurred prior to the order for sequestration," not prior to the act of insolvency. I do not see how I can go out of the letter of the Act to impose a condition not imposed by it, and I therefore think this objection also cannot be sustained.

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Preliminary objections over-ruled.

Mr. *Fellows* and Mr. *Holroyd* for the alleged Insolvent, upon the merits.—There is no sufficient act of insolvency proved. The rule discharging the rule *nisi* at Law, with costs, is not a "sentence of any competent court," within the meaning of the 5 *Vic.*, No. 17, sec. 5. The *fi. fa.* to the sheriff of a limited district was not co-extensive with the sentence of the Court; and to constitute this an act of insolvency writs should have been issued into all the circuit districts of the Colony. In fact, the effect of the Act appointing different sheriffs of different circuit districts, has virtually been to repeal the act of insolvency by not pointing out disposable property, and render it incapable of being committed. Here there is in fact no evidence of a refusal to point out, for property was pointed out, but the sheriff could not take it, it being out of his bailiwick. In this case no collusion between *Watson* and *Hewitt* is either alleged in the petition or shewn in evidence, but this is necessary in order to bring the case within the section giving jurisdiction to revive. Lastly, the debt of the original petitioning creditor is not a good petitioning creditor's debt, not being one upon which an action would lie. *Gregory v. King* (*f*).

Counsel for the petitioning creditor were not called upon in reply.

(*f*) 1 W. & W., Law, 92.

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MR. JUSTICE MOLESWORTH:—

In this case I had the same arguments substantially addressed to me on the former occasion, and I then dealt with them. It is hardly necessary for me to repeat the observations I then made with reference to those different objections.

Whether the original petitioning creditor's debt would have been sufficient to sustain the petition it is unnecessary for me to say, as I do not think that question is involved in the present application. There is in this case, I think, the sentence of a Court of competent jurisdiction, and the alleged Insolvent failed to point out disposable property to satisfy it. It has never been decided what this pointing out means. I have in some cases intimated that I should be disposed to give a latitude to the words "point out," i.e., not to restrict them to an actual pointing out of a visible object, but to allow them to include the conveying to the mind of the sheriff's officer the existence of the thing. But in all cases I should hold it is not enough to say—"I told the sheriff I had property here and property there," without affording any evidence of the truth of that statement. The practical working of the Act would cease altogether if the mere assertion that a man had property was a sufficient pointing out to send the sheriff's officer on a wild goose chase to look for it. I should hold, under such circumstances, that the person who relies upon such assertion of the possession of property, should afford evidence of its truth, and not merely prove that he made such a statement. Here the Insolvent has not attempted to afford any evidence of the truth of his assertions, and I have no reason to suppose that he really was possessed of that which would afford the means of satisfying this debt. Upon the whole, I shall make absolute the order for the revival of the sequestration.

Order absolute.

Point out

IN RE THOMAS POGONOWSKI, AN INSOLVENT.

1864.

April 14, 18.

THE Chief Commissioner of Insolvent Estates had, on the facts appearing in course of the examinations in this insolvency, deemed it his duty, under 7 Vic., No. 19, sec. 18, to refuse the Insolvent his certificate, although there was no opposition, by the official assignee or by any individual creditor. He had also thought the case one coming within the words of sec. 19, and in default of bail had committed the Insolvent to prison until the next sitting of the Supreme Court in its insolvency jurisdiction. The Insolvent was now brought up in custody for the Court to deal with him. The facts of the case sufficiently appear from his Honor's judgment.

An Insolvent filed his schedule suppressing the ownership of the greater portion of his property, and introducing a fictitious statement as to debts. Upon the messenger of the Court seeking to seize goods, the property of the Insolvent, he did not surrender them, but falsely represented them as the property of a woman with whom he was cohabiting.

Held, that in so doing he perpetrated an offence within 7 Vic. No. 19, s. 18, and became liable to punishment under s. 19.

Sir George Stephen was heard for the Insolvent.

No one appeared against him.

Cur. adv. vult.

18. MR. JUSTICE MOLESWORTH now delivered judgment as follows :—

You were indebted in a sum of £136 some shillings, and appear, when sued, to have had sufficient means to pay that debt. But, instead of paying it, acting as you were ill-advised, you executed a conveyance of your business as a photographer, intending thereby, for a nominal consideration of £20, to convey the utensils and property to a woman with whom you were cohabiting. You afterwards filed your schedule, suppressing the ownership of the greater portion of your property, introducing a fictitious statement as to debts, and admitting that you owed the debt for which you were

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sued. A messenger of insolvency called at your establishment, in order to take possession of the goods you had surrendered. He then inquired whether the property there belonged to you, and you represented it as belonging to the woman to whom you had made an assignment. You also adopted a proceeding intended, in some degree, as a bribe to this officer not to perform his duty, you having taken for him a likeness valued, by the trade price, at £5, for which you expressed your intention of making no charge. He, however, was not satisfied with this surrender, and returned afterwards with officers of the Court, and took possession of a good deal of the property, part of which was upon your person, and the remainder on the premises. You afterwards appeared before the Insolvent Court, and then made a full and fair disclosure of your property, and of all the dishonesties you had previously committed.

In this case it is insisted that, inasmuch as there was no mechanical removal of any portion of the property, and as the pretended conveyance could not be operative upon the property, but only as regards your business, you have not committed any offence under the 73rd section of the "*Insolvent Act*," 5 Vic., No. 17. Were you found guilty of fraudulent insolvency, you would be liable to transportation for fifteen years, or not less than five, and to imprisonment for a period not exceeding three years. With regard to your offence being merely a conveyance of the business, there being no mechanical removal of property, I should hesitate to say that, under that clause, you are guilty of any offence for which, upon an ordinary criminal prosecution, you might be convicted. But the section I have now to deal with embraces other cases besides those of the particular class referred to. When the messenger came to seize your property, you ought to have surrendered it; but, instead of doing so, you made an untrue representation as to its ownership; and I think you then perpetrated an offence under the 18th section of the Act 7 Vic., No. 19.

Though subsequent penalties you have undergone, and the abandonment of that property to your creditors, may operate in some degree to mitigate the punishment the Court will now inflict, criminality was nevertheless incurred by the non-surrender of the property in the first instance. I cannot see that the subsequent giving up of the property indicates the existence of any conscientious scruples. It was given up because it was seized—you could not resist its seizure, and did not attempt. You were not so foolish as to attempt, by further untrue assertions, to protect the property which nothing could save, and you are not entitled to consideration on this account.

You have clearly committed an offence under the Act, and the sentence of the Court is, that you be imprisoned for a period of nine months.

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IN RE ALLAN FISHER, AN ALLEGED INSOLVENT.

ORDER *nisi* for compulsory sequestration.

Mr. *Laves*, for the petitioning creditor, in support of the order *nisi*.

Mr. *Holroyd*, for the alleged Insolvent, *contra*.—Neither the petition, order, or summons allege any sufficient act of insolvency. These documents allege that the debtor, having the sentence of a competent Court against him, and being thereunto required by a proper officer, did not satisfy the same or point out sufficient property to satisfy the same. This is not

April 21, 28,

A petition for compulsory sequestration averred that the debtor having the sentence of a competent Court against him, and being thereunto required by a proper officer, did not satisfy the same or point out sufficient property to satisfy the

same; but did not state that the officer failed to find sufficient property to satisfy the sentence.

Held, that the petition did not sufficiently set forth the alleged act of insolvency; leave to amend refused; and Order *nisi* discharged without costs.

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enough—the 5 *Vic.*, No. 17, sec. 6, requires, farther, that the officer should also fail to “find” (whether pointed out or not) sufficient property to satisfy the sentence; and such failure of the officer to “find” such property, as a constituent element in this sort of “act of insolvency,” must be specifically alleged in the petition and other documents, under section 13 of the Act. *In re Gibb (g)*.

Mr. Lawes in reply.—The not finding of property by the officer was no constituent part of the debtor’s “act of insolvency,” but merely evidence corroborative and confirmatory of the debtor’s inability to pay, and of his neglect to satisfy the judgment when thereunto required by the officer; the failure to satisfy the sentence being the essence of the act of insolvency.

Cur. adv. vult.

April 28.

MR. JUSTICE MOLESWORTH.—In this case an objection is raised to the regularity of the proceedings on the ground that neither the petition nor the order disclose a sufficient act of insolvency. Under the 5th section of the “*Insolvent Act*,” as to this act of insolvency, the several ingredients are the sentence of a court of competent jurisdiction, an execution, a demand by the officer charged with the execution, and the non-payment and non-pointing out. The Act then goes on to specify as another ingredient a return by the sheriff’s officer or his affidavit that there has been no sufficient disposable property found to satisfy the sentence. This last alternative is obviously of importance, because a case might occur in which a person was requested to point out or to pay, and did neither, but where, notwithstanding that, the officer actually levied the amount of the execution. This, therefore, appears to me to be one of the essentials of the act of insolvency, and

not to be sufficiently stated. If we come, then, to the 13th section of the Act, the Supreme Court, upon a petition setting forth the alleged act of insolvency, may place the estate under sequestration. In the present case, the petition does not sufficiently set forth the alleged act of insolvency. If the debtor were traversing this petition, he could not traverse the fact of whether the officer did actually levy the amount. Therefore that which gives jurisdiction to the Court being defective, I think I ought to discharge the order *nisi*; but, under the circumstances, I will discharge it without costs. I do not think I ought to allow amendment. It is the act of the parties, not the act of the Court, and I doubt whether this petition gives the Court any jurisdiction at all.

Order nisi discharged without costs.

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FISHER.

IN RE THOMAS NEWBIGGING, AN ALLEGED INSOLVENT.

RULE *nisi* for compulsory sequestration. In this case it appeared by the affidavit of service that service of a copy of the summons had been effected "by delivering the same to the person acting as barman of the hotel known as *Cooper's Family Hotel*, at that hotel, being a competent person residing at the last known place of abode of the above-named *Thomas Newbigging*." Notice of objections had been filed, stating several special grounds, and concluding as follows:—"I intend to dispute the regularity and sufficiency of the proceedings herein."

Mr. *Laves*, on behalf of the alleged Insolvent, took a preliminary objection to the service of the summons.

served under the provisions of "*The Common Law Practice Act*," or a special order must be obtained.

May 26.
Filing notice of objections, one of them being upon the ground of the irregularity of the proceedings, does not preclude an alleged insolvent from objecting to insufficiency of service.

Where the Insolvent cannot be served personally, he must be

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Mr. *Atkins* in support of the rule.—The filing a notice of objections is an admission of the regularity of service. In *re Harry (h)*.

MR. JUSTICE MOLESWORTH.—I am not prepared to say that I should follow that case, but the present is distinguishable from it as the notice of objections expressly relies upon the irregularity of the proceedings as a ground of objection. I do not think that an alleged Insolvent is debarred from discharging a rule obtained against him on the ground of an informal service because he has stated other grounds of objection, lest that should fail.

Mr. *Lawes*.—The 25th section of the "*Insolvent Act*" requires service in the same manner as by law provided for the service of any other summons, i.e., in the mode prescribed by the 18th section of "*The Common Law Practice Act 1856*," by which the 9th of the rules made under the provisions of the "*Insolvent Act*" is in effect repealed, and the mode of service thus pointed out has not been followed. If the 9th rule be relied upon, the affidavit is insufficient, as it does not appear that the debtor cannot be personally served. "The last known place of abode" is not equivalent to "the usual place of abode," nor does it appear that the person served was an inmate or resident of the last known place of abode.

Mr. *Atkins* in support of the rule.

MR. JUSTICE MOLESWORTH.—I think that no sufficient service has been proved. Where personal service cannot be effected, recourse must be had to the provisions of "*The Common Law Practice Act*," and if it be found impracticable to effect service under that Act, the Court, upon special application, may sanction some other mode of proceeding; but in this case there is nothing to shew that the Insolvent might not have

been personally served, and even were this shewn, there would still be no proof of proper service. The rule must either stand over, the petitioner paying costs, or if he prefer, what appears to me the better course, it will be discharged.

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Mr. *Atkins* consented to the rule being discharged.

Rule discharged.

IN RE WILLIAM BATEMAN, AN INSOLVENT.

IN this case the Commissioner for the Geelong Circuit District had refused the Insolvent a certificate in September, 1857. He took no steps to appeal against the Commissioner's decision until April, 1860, when he endeavored to appeal under 10 Vic., No. 14, sec. 7. The Court then refused to entertain the appeal, Mr. Justice *Pohlman* holding that this section could only apply to cases in which the Commissioner's refusal had been confirmed by the Supreme Court, on appeal by the insolvent (*j*). The insolvent presented another petition of appeal, dated 29th April, 1864, a majority of creditors concurring, as required by the above section. This appeal now came on to be heard.

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The Court has no jurisdiction, other than that conferred by Statute, to entertain an appeal from the refusal of an Insolvent's certificate

Mr. *Lawes*, for a creditor.—The Court has no jurisdiction. The point has already been decided against the Insolvent upon the words of the Act; and the same construction was put upon the section in the case of *In re John Chapman* (*k*).

MR. JUSTICE MOLESWORTH stated that he should follow these decisions.

(*j*) *Vide Argus* newspaper of 6 October, 1860. (k) Sup. Ct. Vic., July, 1861.

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In re
 BATEMAN.

Mr. *Billing* for the Insolvent.—As the Court declines to re-open the question of appeal under that section, I shall confine myself to the right of altering the Commissioner's decision, which the Court possesses independent of statute. The mode of appeal in the first instance, pointed out by the 20th section of 7 *Vic.*, No. 19, is merely indicative of one proceeding which may be adopted, and not prohibitory of any other. Although it mentions a time within which an appeal may be made, there is nothing to destroy the right of appeal after that time has expired. Notwithstanding the words of that section, the Court has power to entertain an appeal at any time by virtue of its inherent jurisdiction, having the same power as the Lord Chancellor has under the great seal. Were there no such section in the Act, the Court could still have heard an appeal. The words of the statute are directory rather than compulsory, and are not sufficient to prevent the Court from exercising its jurisdiction after the time at which it declares that an appeal may be made. *Res v. the Inhabitants of St. Gregory* (l), *Ex parte Hanson* (m), *Anonymous* (n), *Ex parte Dawdney* (o), *Ex parte Roffey* (p), *Ex parte Williamson* (q), *Christian's Bankrupt Law* (r).

Mr. JUSTICE MOLESWORTH.—I do not think that I have the power to entertain this appeal. In many points the machinery of the Insolvent Acts is imperfect, and gross injustice would arise from the absence of direct provisions if the Court did not assume to itself jurisdiction to supply the deficiencies of those acts, and the Court has in such cases consented to remove an evil which would otherwise be irremovable. But such assumed powers have only been exercised where the Act has been silent in respect to the mode in which its provisions are to be carried out. We are now dealing, however, with what the Act has amply provided for in limiting

(l) 2 A. & E., 99.
 (m) 12 Ves., 348.
 (n) 14 Ves., 451.
 (o) 15 Ves., 496.

(p) 19 Ves., 468.
 (q) 1 Atk., 32.
 (r) Vol. II., p. 15.

the common law rights of a creditor to be paid his debt out of any property which his debtor may at any time acquire by permitting the debtor under certain limitations and restrictions to obtain his certificate, and I have no power to alter these limitations and restrictions. The Commissioner's discretion in granting such a certificate is controllable by an appeal, the Act being rigidly stringent as to the time within which that appeal must be made. Whether the certificate be allowed or disallowed, the appeal must be immediate. The Act alone can be looked to as to granting, suspending, or refusing an insolvent's certificate, both as to the manner in which it is to be done, and the results of doing it. It is enabling in favor of the Insolvent as against the common law rights of his creditors, and I cannot extend the powers which it thus gives. But even if I could regard the clauses of the Acts with respect to the granting of certificates as directory only, and not compulsory, and felt competent to exercise any discretion in the matter, although I might rectify any accidental omission in following its directions, I should refuse to entertain an appeal in a case such as this where seven years have elapsed since the decision which is appealed against was pronounced. To do otherwise would be contrary to the Act, whether its provisions were compulsory or directory, as its directions are clearly opposed to any delay in prosecuting an appeal. I shall, therefore, refuse this application with costs.

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Appeal dismissed with costs.

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It is ground for the refusal of a certificate of discharge to an Insolvent, that after the sequestration, and without leave of the creditors or the Court, he left the Colony, and had not returned when the application for certificate was made.

IN RE ARTHUR HEWITT, AN INSOLVENT.

APPEAL against a decision of the Chief Commissioner of Insolvent Estates, who had refused to grant a certificate of discharge to the insolvent, on the ground that after the sequestration, and without leave of the creditors or the Court, he had left the colony, and had not returned when the application for certificate was made (s). The insolvent had gone to New Zealand, where he was earning a small salary as an attorney's clerk, and the petition stated that he had not the means to return to Melbourne.

Mr. *Laves*, in support of the appeal, submitted that the insolvent having been absent, the Commissioner ought to have delayed giving judgment; or, on the other hand, if he thought the insolvent deserved punishment, a suspension instead of a refusal of certificate would have been sufficient.

His Honor, after remarking upon the large indebtedness of the Insolvent, and the almost nothingness of the assets, did not think it was a case for the Court to interfere.

Appeal dismissed.

(s) *Vide* 5 Vic., No. 175, s. 66, and 7 Vic., No. 19, s. 18.

IN RE FREDERICK AUGUSTUS RUCKER, AN
INSOLVENT.

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THE estate of this Insolvent had been sequestrated in the year 1843, prior to the passing of the 7 Vic., No. 19, and two trustees had been appointed under the provisions of 5 Vic., No. 17. These trustees were subsequently removed under 5 Vic., No. 17, s. 57, for absence from the colony, and Mr. *Alexander Laing*, one of the official assignees, was thereupon elected as trustee of the estate. In 1863, Mr. *Laing* left the colony, and Mr. *Moore* was, by order of the Chief Justice, under 7 Vic., No. 19, s. 12, appointed official assignee of all estates of which Mr. *Laing* had been "official assignee," and by mistake the order for his appointment was made to include this estate.

An application for the appointment of a new trustee of an insolvent estate under 5 Vic., No. 17, s. 57, in place of an official assignee, erroneously appointed, should be made either on notice to such official assignee or with his concurrence.

Mr. *Holroyd* now moved, under 5 Vic., No. 17, sec. 57, for an order for the election of a new trustee in the place of Mr. *Laing*.

The confirmation by the Court of the election of a new trustee under 5 Vic., No. 17, s. 57, need not be at the next sitting of the Court.

MR. JUSTICE MOLESWORTH.—I think this application ought to be made either on notice to Mr. *Moore*, or with his concurrence. I see no difficulty in the application otherwise. I think the order should be declaratory that Mr. *Moore* is not a trustee of this estate, and then make a reference to the Chief Commissioner to proceed to an election of a new trustee.

An order was subsequently made, on the consent of Mr. *Moore*, for a meeting of creditors to elect a new trustee in place of Mr. *Laing*. It was held on 24th June, and Mr. *Moore*, official assignee, was elected, and accepted office. Through an oversight the election was not presented by the Chief Commissioner for confirmation at the next sitting of the Court.

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The Act provides "that so soon as the trustees elected by the
 "creditors shall have accepted their office, it shall and may be
 "lawful for the Supreme Court to make an order confirming
 "the appointment of such trustees."

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Mr. *Holroyd* now applied to the court for an order of confirmation *nunc pro tunc*, or such other remedy as the Court would apply.

MR. JUSTICE MOLESWORTH.—I think the confirmation need not be at the next sitting of the Court. Therefore, any special order such as now asked is not necessary.

No order.

June 2, 11,
 16, 30.
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IN RE GEORGE THOMAS, AN INSOLVENT.

Discounting a forgery comes within the letter of the 5 *Vic.*, No. 17, s. 73, as "contracting a debt fraudulently by means of a false pretence," and is an act of fraudulent insolvency.

APPEAL by creditors against the decision of the Chief Commissioner suspending the Insolvent's certificate for twelve months, they contending that the certificate should have been altogether refused. There was also a cross petition of appeal by the Insolvent against the suspension of the certificate, and praying for its immediate grant. The facts of the case are fully stated in his Honor's judgment.

Sir *George Stephen* for the opposing creditors.

Mr. *Billing* for the Insolvent.

Cur. adv. vult.

As to the conduct for which a certificate should

be withheld, the Court is not limited to the enumeration in the Act 7 *Vic.*, No. 19.

An objection to the grant of a certificate to an insolvent charged him with having knowingly and wilfully given false answers and false explanations when under examination on oath,

Held, that the offence under the Act related to answers by the Insolvent to inquiries made for the discovery of assets, &c., and not to answers to protect himself from the refusal of a certificate; and objection overruled.

MR. JUSTICE MOLESWORTH:—

In this case the learned Commissioner suspended the certificate of the Insolvent. The creditors have appealed, insisting that the certificate should have been altogether refused. *Thomas* has appealed against the suspension.

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The charge earliest in date and greatest in magnitude is forgery and uttering: that is, having deposited with him a blank acceptance, given to another person for another purpose, fraudulently filling it up as a bill to himself and discounting it. This, although amounting to felony and injuring individuals, I think comes under the Act, 5 Vic., No. 17, sec. 73, defining acts of fraudulent insolvency. Several of the offences there enumerated might be larceny. Discounting a forgery comes within the letter of the clause, contracting a debt fraudulently by means of a false pretence. Besides, we have in several cases held, that as to the conduct for which a certificate should be withheld we are not limited to the enumeration in the Act 7 Vic., No. 19.

Mr. *Scott* was extensively connected with *Thomas* in buying and refitting ships, and had some similar dealings with Mr. *Barnes*, living at Williamstown, and had obtained several acceptances from *Barnes*, and passed them to *Thomas*. *Scott* and *Barnes* had been about purchasing the ship "*Hindoo*," and on the 9th June *Barnes* gave *Scott* the blank acceptance in question, to be filled with such sum as might be wanted for that purpose. This was handed by *Scott* to *Thomas*. *Thomas* filled it as a bill drawn by himself on *Barnes*, dated June 1, 1863, at three months, for £250 12s. 6d. This bill he failed to discount, but indorsed and deposited it in the Bank of New South Wales, where he kept his account as an auctioneer, and thereby increased his credit; and, getting it out of that bank, he, on the 14th of July, discounted it with Mr. *Jenner*. On the 3rd of September *Thomas* called a meeting of his creditors, and proposed 5s. in the pound. Subsequently, September 28,

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he voluntarily sequestrated his estate. *Jenner*, as indorsee of the bill in question, commenced an action by the summary process on bills against *Barnes*, and *Barnes* got liberty to defend it upon affidavits of himself and *Scott*—I presume conformably to their evidence in this matter—and the action was not prosecuted, but the bill given up to him. The learned Commissioner on this subject decided in favor of *Thomas*. [His Honor read at great length, and commented on, the evidence given in support of and in opposition to this charge, and proceeded :—] On the whole, I believe, in the words of the first charge, that *Thomas* “received from *Scott*, for the “purpose of deposit in his safe for safe custody, a piece of “paper with the name of *Barnes* written across it, and that, “without the authority or knowledge of *Scott* or of *Barnes*, “he drew a bill of exchange on the said paper, dated the 1st “of June, 1863, and uttered the said pretended bill of “exchange, well knowing the same to be a forgery ; and that “on several occasions, when the said *Scott* and *Barnes* “demanded the said paper back from him, he falsely pretended “that he had lost it.” But I have considerable doubts whether *Scott* did not sanction the filling in in its inception. That supposition, however, would go to inculcate *Scott*, not to exculpate *Thomas*. Before I could say *Thomas* was the dupe of *Scott*, I must believe that *Scott* made *Thomas* think he had *Barnes's* authority to fill the blank bill for his own purposes in making a payment to *Thomas* ; and, having regard to *Barnes's* statements as to his conversations with *Thomas* before and after the bill fell due, I must either suppose *Barnes* perjured, or that *Thomas* sacrificed his own character in order to save that of *Scott*. I would have less doubt in affirming a charge of filling and uttering the bill without having, or supposing he had, *Barnes's* authority.—[His Honor then referred to several other charges which on the evidence he did not consider proved, and proceeded :—]

The transactions with Mr. *Mills* form the subject of objections 2, 4, 5 and 6. About August 27, 1863, the Insolvent got ten

wooden houses from *Mills* for shipment to New Zealand, price £400, on credit. He hypothecated the bill of lading. On the 29th August—Saturday—he applied to *Mills* for a loan of £280, and obtained it on a pledge of the scrip for 100 shares of the National Bank, which he said were worth £480. Two days after—Monday, August 31—*Mills* got a transfer slip, and asked him to sign it. He said he could not, as he had drawn against it, and overdrawn, at the National Bank. About two days after this—September 2—he sold a ship called the "*William Buchanan*" to *Mills*, the price being partly the debt for the ten wooden houses and the loan of £280; and thereupon *Mills* receipted the invoice for the houses. *Mills* thought he bought the ship free; but, instead of that, she was liable to demands for arrears of seamen's wages, and she had been chartered, and £300 of the charter money was received by *Thomas*. *Mills* states he had to pay £1,560 before he got possession of the vessel: but this is not all to be regarded as breach of contract.

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The fourth objection relates to getting the wooden houses, being insolvent, not intending or expecting to pay for them. As to this, I do not dissent from the Commissioner's acquittal. *Thomas* certainly made great efforts to discharge this obligation—so much so as to incur the imputation of fraudulent preference. I cannot say that he was reasonably hopeless of carrying on business long enough to discharge the debt; but the actual receipt to the invoice was procured by a sale on misrepresentation.

The Commissioner considered the second charge proved—namely, that of having borrowed from *Mills* on the security of scrip, representing it as ample security, well knowing that it was already pledged for its full value, and held as a security by the National Bank. The evidence of *Thomas's* cognizance of the liability depends, not merely on the deed of partnership of that bank, which probably he never read, but the evidence of *Mr. Cunningham*, the manager, who states that when

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pressing *Thomas* for his overdrawn account, *Thomas* said the shares were rising, and he wished him to hold them for a few months, as he thought them good security. The Commissioner deciding against *Thomas*, was, I think, bound not merely to suspend for a year, but refuse. He considered the offence mitigated by *Thomas* having bills lodged in the bank which might meet the overdraft; but he had been overdrawn throughout the year, the bills lodged had been refused discount I believe, and there is no evidence that they have since discharged his liability. As to these transactions with *Mills*, *Thomas* is in contradiction with him. He denies that he told *Mills* that he had drawn against the scrip. The Commissioner sustains the ninth charge so far as regards books insufficiently kept, not as to concealing a block cheque book. I concur in this.

Another objection charges *Thomas* with having knowingly and wilfully given false answers and false explanations when under examination on oath, and especially in reference to the blank acceptance. Now, the offence under the Act is, making a false answer to any lawful question with intent to defraud creditors; relating, I think, to inquiries made for the discovery of assets, &c. The objection, and the materials in this case, would relate rather to answers to protect himself from the refusal of a certificate. I should be unwilling to construe the Act so as to substitute the insolvency jurisdiction for a trial for perjury. I have necessarily expressed an opinion against the truth of *Thomas's* testimony, but do not think a prosecution for perjury would probably succeed.

My definite opinion is, that the first, second, and part of the ninth objections are sustained; but as to the first, feel that diffidence that I always do in differing from the learned Commissioner. My order is, that the certificate be absolutely refused. No costs.

IN RE JANE SOLOMON, AN INSOLVENT.

1864.

April 28.

May 5.

Sept. 19, 26.

APPEAL by *Henry Benjamin*, a creditor of the insolvent, from a decision of the Chief Commissioner of Insolvent Estates granting the insolvent her certificate. The principal ground of opposition to the granting of the certificate relied on, and upon which the judgment of the Court went, was that the insolvent, being at the time indebted, had disposed of otherwise than *bonâ fide*, and for a valuable consideration, a large portion of her property.

J. S. was executrix of *P. S.*, her husband. In July, 1861, *B.* instituted a suit against *J. S.* as executrix to establish a sub-partnership between himself and *P. S.* On 20th January, 1863, pending the suit, *J. S.* settled all her property on one of her daughters upon the occasion of her marriage. On the 7th October, 1863, a decree was obtained by *B.* declaring him entitled as a sub-partner with *P. S.*, and directing accounts of the sub-partnership. On the 25th November, 1863, *J. S.* voluntarily sequestrated her estate.

From the evidence taken in the Insolvent Court, it appeared that the insolvent was the sole executrix and universal devisee and legatee of her late husband, *Philip Solomon*, who died in January, 1857. *Philip Solomon* was, up to the time of his death, a partner in the firm of *Solomon & Levy*, and in July, 1859, the insolvent, as the personal representative of her deceased husband, instituted a suit against *Levy* for an account of the partnership transactions. In May, 1861, a decree on further directions was made in this suit by which *Levy* was ordered to pay to the insolvent about £2,000, as the balance due to her on the partnership accounts. In July, 1861, the present opposing creditor, *Benjamin*, instituted the suit of *Benjamin v. Solomon* against the insolvent, as executrix of her husband, to establish a sub-partnership with him in the firm of *Solomon & Levy*, and for payment of a share of the money received by the insolvent from *Levy*, and other part-

On appeal from the decision of the Chief Commissioner, granting the insolvent her certificate, *Held*, by the primary Judge, and on appeal by the full Court, that *J. S.* was indebted to *B.* at the date of the settlement, though the proof of it had not then been established; that looking at all the circumstances of the case the settlement was not a *bonâ fide* one, but colorable only, and the consideration of marriage could not support such a settlement; and certificate refused on the ground that the insolvent being indebted had unjustifiably disposed of property otherwise than *bonâ fide* and for valuable consideration.

Per Molesworth, J.—A settlement executed in anticipation of the possible result of pending litigation may be as fraudulent as if executed after the result is known.

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nership moneys received by her. This suit was actively defended by the insolvent, and in March, 1862, was registered as a *lis pendens*. On the 20th January, 1863, immediately previous to the marriage of her eldest daughter, the insolvent executed a settlement of that date in favor of such daughter of all her real estate, including that which had become vested in her under her husband's will. At this time the insolvent had five other children besides the daughter about to be married. By the settlement the daughter's husband took no beneficial interest whatever, the settled property being conveyed in trust for the separate use of the daughter, and made subject to her appointment, without any restriction upon alienation or anticipation. On the 7th October, 1863, a decree was made in the suit of *Benjamin v. Solomon*, declaring the Plaintiff entitled as a sub-partner with *Philip Solomon* deceased to half the share of *Solomon* in the firm of *Solomon & Levy*, directing accounts of the sub-partnership against the Defendant, the present insolvent, and decreeing her to pay the Plaintiff's costs up to that decree. On the 18th November, 1863, these costs were taxed at £515 10s. 9d., and on the 25th November, 1863, the insolvent voluntarily sequestrated her estate. There was no evidence that the trustees of the settlement had entered into possession of any of the settled property, or that the daughter of the insolvent had been in receipt of any of the rents or profits of it. It appeared, however, that the insolvent had continued after the settlement in occupation of one of the houses settled, and which had been previously occupied by her, and that no rent had been paid by her either to the trustees of the settlement or to her daughter. Evidence was given by the insolvent of a promise made by her to her husband shortly before his death to make a settlement on her daughter when she should marry. She, however, admitted that she had never communicated this promise to her daughter or her intended husband until the settlement was being actually prepared immediately antecedently to the marriage.

Mr. *Billing*, for the opposing creditor, in support of the appeal.

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Mr. *J. W. Stephen*, for the Insolvent, *contra*.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

May 5.

The grant of a certificate in this case has been objected to on four specific grounds, but I shall only deal with two of them as material to the present question. It has been contended that the insolvent has made a settlement of a considerable portion of her property on one of her daughters, which, although it may be, strictly speaking, for valuable consideration—namely, marriage—is not, in fact, *bonâ fide* within the meaning of the section of the *Insolvent Act* relating to the refusal of a certificate. The proceedings in the Equity suit against the insolvent not having been put in, I have to deal with somewhat loose evidence as to her indebtedness at the time of executing the settlement. The evidence is, however, sufficient to shew that *Benjamin* has established a sub-partnership with the deceased *Solomon* in the partnership of *Solomon & Levy*, and that Mrs. *Solomon* had previously to the execution of the settlement received large sums of money in respect of that partnership, in which sums *Benjamin* was entitled to participate as a sub-partner. There is enough, therefore, to shew that she was indebted to *Benjamin* at the date of the settlement, the 10th of January, 1863. The question then arises whether the settlement made on the daughter was a *bonâ fide* one. It was for a valuable consideration, as far as marriage is one, but if the settlement, although executed on the occasion of the marriage, was made with other objects than the ostensible one of providing for the daughter about to be married, I think it cannot be considered *bonâ fide*. I entertain grave suspicions as to the truth of the

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allegation made by the insolvent that she acted in pursuance of the intentions of her deceased husband, expressed in his life time, and promised by her to be carried out: This lady, the mother of six children, has settled all her property on one daughter, as alleged, in obedience to the wishes of her deceased husband, and with the view to the marriage of that daughter. No intention of the kind was ever promulgated to add to the young lady's attraction to suitors. This settlement formed no part of the negotiation with the intended husband, and was no inducement to the marriage, but Mrs. *Solomon* would, according to her version, appear to have reserved it as an agreeable surprise to, and reward of disinterestedness in, her son-in-law after marriage. The whole thing, on the face of it, is, in my opinion, grossly improbable. There is no evidence that the property has ever been entered upon by the trustees, or otherwise regarded than as still the property of the insolvent. It has been said that at the time of this settlement *Benjamin* had established no claim against the insolvent or her deceased husband's estate; but a settlement executed in anticipation of the possible result of pending litigation may be as fraudulent as if executed after the result is known. So far back as July, 1861, *Benjamin* had preferred his claim, and on several occasions between that and the date of the settlement attempts had been made by the insolvent, or on her behalf, to adjust it. Looking at all the circumstances of this case, I have no doubt that the settlement was not a *bonâ fide* one, but a colorable one only, and such as by virtue of secret arrangements, or, perhaps, understanding only, still left the property to some extent under the insolvent's control, or available to the fulfilment of her wishes; and on this ground alone I am of opinion that the certificate should have been refused.

My mind is also under great doubts as to the truth of the account of the disposal of other portions of the property. A sum of £6000 is shewn to have come into the hands of the insolvent, which has disappeared, and there is no attempt to explain what has become of it. However, whilst entertaining

doubts of the good faith and full truth of the insolvent's statements on this part of the case, I do not found my judgment on them, but base my decision on the execution of the settlement of January, 1863, which I think colorable, and not *bonâ fide*. I therefore reverse the decision of the learned Chief Commissioner, and order that the insolvent's certificate of conformity be disallowed.

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Appeal allowed ; certificate refused.

From this order of his Honor Mr. Justice Molesworth the Insolvent now appealed to the full Court (†), on the ground that the evidence did not justify his Honor in refusing to allow the certificate. September 19.

Mr. Dawson and Mr. J. W. Stephen for the Appellant.—There is no evidence that the Insolvent was indebted at the time of the execution of the settlement. No doubt, as held by this Court in *Goodman v. Hughes* (v), a settlement made to defeat a person who has a cause of action against the settlor is fraudulent within the 13 *Eliz.* But in that statute the words “being indebted” do not occur as they do in the section of the “*Insolvent Act*” now under consideration. Moreover, Mrs. Solomon, if indebted at all at the time of the settlement, was so *in auter droit* as executrix, but the property settled was her own. This settlement was for valuable consideration, namely, marriage; and a person under liabilities or having debts, either in *præsenti* or in *futuro*, is not thereby prevented from alienating his property; and even if the Insolvent took advantage of the approaching marriage of her daughter to effect this settlement that will not render it void. In *Abraham Bial's* case (w), and in *McGarrell's* case (x), it was held

(†) *Coram Stawell*, C. J.; *Barry*, J.; and *Williams*, J.
(v) 1 W. & W., Eq., 202.

(w) Sup. Ct. Vic., May, 1857.
(x) Sup. Ct. Vic., Nov. 1860.

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that a deed which would be fraudulent in England would not necessarily be fraudulent here. Even if this settlement were held to be void as against the present opposing creditor, as having been executed within twelve months of the insolvency, and when the Insolvent was indebted to him, still this would not afford ground for refusing the certificate. *In re Mahoney* (y).

Mr. Billing and Mr. Webb for the Respondent, the opposing creditor.—The Insolvent was, in fact, indebted to *Benjamin* at the date of the settlement, although that indebtedness was only conclusively established by the decree; and although she was only so indebted as executrix, still the property which she settled was derived by her under her testator's will, and would but for the settlement, be in this colony liable at law for his debts. If the settlement was, in fact, executed with intent to defeat a creditor, although ostensibly there was the valuable consideration of marriage, the settlement would be held void. *Colombine v. Penhall* (z), *Hall v. Wallace* (a). Even if the settlement were executed for valuable consideration and could not itself be impeached in equity as against the beneficiaries under it, yet if the Court should be of opinion that it was executed with intent on the part of the settlor to defeat a creditor, the settlor would be liable to the refusal of her certificate; for the Act 7 Vic., No. 19, sec. 18, provides that the certificate shall be refused where the Insolvent shall have "disposed of otherwise than *bona fide* and for a valuable consideration any of his property." So that there must be both *bona fides* and valuable consideration to exempt the Insolvent from the operation of this clause. In this case the Insolvent having five other children settles all her property upon this one daughter upon the occasion of her marriage, and the magnitude of the gift may be taken as a badge of fraud.

(y) 1 Wy. & W., I. E. & M. 188. (z) 1 Sm. & G., 228.

(a) 7 M & W., 353.

Mr. J. W. Stephen (in the absence of Mr. Dawson) in reply.

Cur. adv. vult.

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THE CHIEF JUSTICE :—

September 26.

In this case the certificate was opposed on various grounds, was granted by the Chief Commissioner, but ultimately refused on appeal to the primary Judge, because the insolvent, being indebted, had unjustifiably disposed of property otherwise than *bonâ fide* and for valuable consideration. The insolvent was executrix of her husband. She settled on one of her daughters before marriage all her property, including all she had received as executrix. Subsequently to the settlement it was found, in a suit between the present opposing creditor and the insolvent, that her husband had entered into a sub-partnership with this creditor in his lifetime, and a decree was pronounced directing the accounts of that sub-partnership to be taken as against the present insolvent as executrix. The indebtedness existed, in our opinion, at the time of the settlement, though the proof of it had not then been established. The insolvent, by frequent attempts at compromising the claim of this creditor, admitted, to a certain extent at least, its justice. Was this settlement then *bonâ fide*, or made to evade the Act? There are grounds for suspecting that the daughter holds the settled property, subject to a secret trust or understanding, for the benefit of the insolvent. But as there is not distinct proof of this, it may be conceded that the insolvent did absolutely deprive herself of the settled property in favor of her daughter. *Primâ facie*, marriage imports a consideration; and unless the contrary is shewn, it may be presumed that the making of the settlement conduced to the marriage. It is possible that the marriage might have taken place without the settlement; but it is equally impossible to tell whether it would have done so. In this instance it is put that the insolvent denuded herself

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of all her property for the benefit of this one only of her several children. The reason assigned by her for so doing, namely, that her husband in his life time verbally expressed a wish that she should make a settlement on this daughter, is scarcely a credible reason for what it is said she actually did. It might have been a reason for some settlement, but not for a settlement of the whole on this one child, to the injury of the other children of the same marriage. The insolvent does not communicate to her intended son-in-law, until a short time before the marriage her intention to make this settlement. He had never asked for one. He was unacquainted until after marriage with the nature of the trusts, or the amount of the property settled; and it is evident that he attached no value to the settlement itself.

The obvious conclusion from the whole evidence is, that the settlement was made by the insolvent as a purely voluntary act so far as she was concerned; that, in fact, she availed herself of the circumstance of her daughter's marriage to withdraw all her property from her creditors, whether from motives of fraud, or to gratify some vindictive feeling, we need not stop to enquire. So long as the deed stands, the settled property is by the insolvent effectually removed beyond the power of the creditors. To hold that marriage under such circumstances as these afforded a valuable consideration for the settlement, would in effect be to say, that in every case where a marriage was contemplated, a person, by taking advantage of that marriage, might defeat his creditors. A settlement having the effect of defeating creditors, is not so expressly prohibited by the Local Insolvent Acts as by the English Bankrupt Law; but it is equally opposed to the spirit of all those enactments. The consideration of marriage cannot support such a settlement. We think the case falls within the clause under which the certificate was refused by the primary judge; and that the appeal from that refusal must be dismissed, with costs.

Appeal dismissed, with costs.

IN RE JOHN M'MANOMONIE, AN ALLEGED INSOLVENT.

1864.

October 6.

ORDER *nisi* for compulsory sequestration, on the petition of *James Quirk*, a creditor by judgments obtained in the County Court. The Order *nisi* had been made returnable on the 29th September, a day within the days prescribed by the rules for the sitting of the full Court in its Appellate jurisdiction in Insolvency; and on that day no single Judge had sat in Court in any jurisdiction. On the first day on which a single Judge did sit—on Monday last, in the Ecclesiastical and Matrimonial jurisdiction—the case was mentioned by counsel for the petitioning creditor, and his Honor postponed it until this day.

Mr. *Webb* now appeared for the petitioning creditor, in support of the order *nisi*.

Mr. *Laves*, for the alleged Insolvent, asked for an enlargement of the order *nisi*. He did so on affidavits, shewing that *M'Manomonie* had been plaintiff in an equity suit against the petitioning creditor as mortgagee in possession of valuable property, in which suit a decree had been made for redemption on payment of what should be found due on the taking of accounts in the Master's office; that the account in the Master's office was nearly finished, and would show a very

Application for an enlargement of an Order *nisi* for sequestration on the ground that accounts were pending in the Master's office between the alleged insolvent and the petitioning creditor, which, when completed, would shew a balance due from the petitioning creditor; or failing that, for leave to file objections *nunc pro tunc* that the alleged insolvent was not really indebted to the petitioning creditor on certain judgments the foundation of the Order *nisi*, such judgments having

been obtained by default by reason of the Defendant's poverty, refused.

The sittings of the Appellate Court do not oust the primary Judge of jurisdiction during such sittings.

Where an Order *nisi* sequestered an estate until a given day "or further order," and such Order was not enlarged on the day named, there being on that day no single Judge sitting, *Held*, that the insolvency did not thereby lapse.

In a petitioning creditor's affidavit of debt it is not necessary to negative the existence of a security where none exists.

The non-numbering of the folios of affidavits in support of a petition for sequestration is to be regarded before making an Order *nisi* for sequestration, but not as cause against it.

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large balance to be due from the petitioning creditor to *M'Manomonie*; that the petitioning creditor was the only creditor of the alleged Insolvent; and that if the Order *nisi* were made absolute, he would most probably suffer injustice, and lose the whole of the probable results of the balance in his favor in the equity suit. The affidavits also were to the effect that the judgments in the County Court had been obtained by default, as the Defendant had not the pecuniary means to defend them in the only effective way—namely, by showing the state of the accounts in the same way as was necessary in the equity suit in the Master's office. Since then friends had come forward and supplied the means of prosecuting the equity suit in the Master's office. If the present order *nisi* were enlarged till the Master's report were presented justice would be done to the alleged Insolvent, and no injustice to the petitioning creditor. If the Court should refuse the application for enlargement, then he asked for leave to file *nunc pro tunc* objections, on the grounds disclosed by the affidavits before mentioned.

Mr. Webb opposed the application.

MR. JUSTICE MOLESWORTH:—

These orders *nisi* affect a great many persons; and I should be very sorry because very debateable questions are pending between the petitioning creditor and the Defendant to lock up the proceedings in insolvency for what may prove to be a very long period, and during that period keep all the rest of the world in a state of uncertainty whether he is insolvent or not. So I shall not postpone the case.

Then I am asked to allow the Defendant liberty to file *nunc pro tunc* objections, that the Defendant was not really indebted to the petitioning creditor on the judgments which he obtained in the County Court, but that those judgments were obtained only by default. I am asked in that way, irrespec-

tively of those judgments, to enter into the complicated accounts between the parties, which are now being taken by decree in the Equity suit in the Master's office. As at present advised, I think that no such question can be raised at this stage, and I must take the act of insolvency to have been the not pointing out property to satisfy those judgments. But, without expressing any judicial opinion on that point, I do not feel at liberty so to deal with this case.

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It is said that the Defendant is an ignorant person who will suffer injustice if this application is not granted. I am quite aware that ignorant persons do suffer under the law from their ignorance occasionally; but I cannot administer one sort of law for one class of persons and another sort of law for another class. There is no valid objection now to be made on these judgments, or to this Order, as based on them. I cannot enter into the motives by which the petitioning creditor may be actuated in proceeding in the insolvency jurisdiction on these judgments, pending the Equity suit against him. It is very often the case that there are some things collateral in the motives prompting such proceedings, but objections of that kind cannot be entertained by me. The Defendant must proceed according to the ordinary law of the colony, under which his official assignee will be his trustee, if there is any surplus of his estate. It will often be the case, I am aware, that an insolvent remains irremediable, so far as the concurrence of his assignee in litigation which he desires to have prosecuted, is concerned; but, theoretically, the official assignee has the same power to prosecute the rights of the insolvent as the insolvent himself has; and in this particular case, if *M'Manomonie's* friends are willing to assist the Defendant in prosecuting the Equity suit through the Master's office, they may be equally well inclined to make advances to the official assignee for the same purpose.

Mr. *Laves* then urged as preliminary objections—(1) That the Order *nisi* called on the Defendant to shew cause on a

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day when the Appellate Court was sitting, which was a *dis non* so far as the jurisdiction of a single judge in insolvency was concerned; (2) that the Order *nisi* sequestrated the estate until the 29th September, and not having been enlarged, the insolvency had lapsed; (3) that the affidavit of debt did not value any security, nor negative the existence of any—it should do either one or the other; (4) that the folios of the affidavits were not numbered.

Mr. Webb for the petitioning creditor *contra*.

His Honor held (1) that the sittings of the Appellate Court did not oust the primary Judge of jurisdiction during the Appellate Sittings—the rule on the subject merely prescribed a convenient practice on the subject, not affecting or limiting jurisdiction; (2) that as the order said “until the 29th September or further order,” the second point was of no weight; (3) that the Act does not require the existence of a security to be negatived where none exists; and (4) that as to the numbering of the folios, the regulation was one to be regarded before making an Order *nisi*, not as cause against it.

Order absolute.

EX PARTE GREGORY, IN RE GREGORY, AN INSOLVENT,
AND IN RE ROYCE.

1864.

Oct. 13, 27.

APPEAL by the Insolvent from a decision of the Chief Commissioner, admitting proof of a debt due on a judgment. The judgment was founded on a verdict regularly obtained in a defended action, and the verdict was sustained by the full Court on a motion to set it aside on grounds of mistake, and miscarriage at the trial. The Chief Commissioner held that he could not review a verdict of a jury on the facts and a decision of the full Court on the law, so far as the facts before him and the law applicable to them were the same as those which were the basis of the judgment debt; that there was nothing before him upon which a court of equity would restrain the judgment creditor from enforcing his judgment; and admitted the proof.

Upon a proof of debt by a judgment creditor the Court cannot review the judgment, except upon the grounds of an equitable defence, or of collusion between the insolvent and the creditor in obtaining the judgment; the latter being a ground which it is open to a creditor to raise, but not to the insolvent himself.

Mr. *Bunny* and Sir *George Stephen*, for the Appellant, cited *Simpson v. Lord Howden* (b), *Ex parte Butterfill* (c), *Ex parte Bryant* (d), *Ex parte Marson* (e), *Marten v. Whichelo* (f), *Keaton v. Lynch* (g), *Jenner v. Morris* (h), *Harrison v. Nettleship* (j), and *In re Harper, Ex parte Duke* (k).

Mr. *Laurens* for the Respondent, the creditor *Royce*.—The judgment is conclusive, and, moreover, this debt is inserted in the schedule filed by the Insolvent, and cannot now be disputed by him.

Mr. *Bunny* in reply.

Cur. adv. vult.

- (b) 3 M. & Cr., 97.
- (c) 1 Rose, 192.
- (d) 1 V. & B., 211.
- (e) 3 Deac., 79.
- (f) Cr. & Ph., 257.

- (g) 1 Y. & C.C.C., 437.
- (h) 30 L. J., N.S., Chy. 361.
- (j) 2 Myl. & K., 423.
- (k) 1 Wy. & W., I. E. & M. 86.

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Ex parte
GREGORY.
In re
ROYCE.

October 27.

MR. JUSTICE MOLESWORTH:—

This is an application to refer it back to the learned Chief Commissioner to review his decision as to a proof of debt tendered in this insolvency. The debt sought to be proved is on a judgment. The case was tried by a jury, who gave a verdict for a large amount against *Gregory*, who alleges that the jury arrived at that amount by a mistaken calculation. However, the case was afterwards heard before the Court in *banco* on motion for a new trial or to reduce the damages, and the Court affirmed the verdict of the jury. *Gregory* has sought to have this demand scrutinised by the learned Chief Commissioner, and he conceiving himself to be concluded by the verdict of the jury and the decision of the Court, has refused to entertain that question, and application is now made to me by way of appeal from his decision. It is not alleged in this case that there is any equitable defence against the judgment of which *Gregory* could have availed himself, nor is it alleged that this judgment was obtained by any collusion between *Gregory* and the judgment creditor; and the question is whether the Commissioner has a discretion to review such a judgment.

The different sections of the "*Insolvent Act*" which bear upon this question are first, the 30th, which directs that further execution of any judgment shall after sequestration be stayed, and that the judgment creditor shall prove his debt and costs against the estate, but not giving the slightest power to the Commissioner or any other tribunal to consider the propriety of that judgment. Then the 31st section directs that all proceedings in any action, pending at the period of sequestration, shall be stayed, but provides that the Plaintiff in any action for unliquidated damages after summoning the official assignee, may proceed to obtain the judgment of the Court thereon, and such judgment when recovered, together with the costs, shall be a debt proveable against the estate. Here again trial by jury is regarded as the proper

course for the ascertainment of the amount, and evidently the amount recovered before the jury would be conclusive in insolvency. Then section 36 says, "that every creditor shall "prove his debt against the said estate by affidavit or other- "wise to the satisfaction of the Commissioner;" but that would appear to be the satisfaction of the Commissioner as a lawyer, that is, that he should say whether the debt was or not binding upon the insolvent. Then the 37th section says, "that all debts due by any insolvent at the time of adjudica- "tion or surrender may be proved against his estate." It is not all just debts or qualified in any such way, but anything to which he himself was subject, whatever might be the history of its contracting. Then the 38th section states, "that every person to whom the insolvent was at the time of "the surrender or adjudication under legal obligation to pay "money at a certain future time shall be accounted a creditor "*de præsenti*." There the words are "legal obligation to "pay," not justly bound to pay. The only test to which the Act refers is not the propriety of the debt but the legal obligation to pay the debt. The question in this case is, on the whole, whether after a formal decision by a jury, affirmed by the full Court, the whole question is to be re-opened before the learned Chief Commissioner, subject to a final appeal to a single Judge, virtually making the decision of a single Judge overrule the decision of the full Court, if he should have the misfortune to differ with it.

The first authority cited in argument was *Ex parte Butterfill*. In that case the petitioning creditor had obtained a verdict, and before that verdict had ripened into a judgment, he became the petitioning creditor, and there was some incidental discussion as to how far his verdict was conclusive; and the Lord Chancellor, I believe Lord *Eldon*, said it was only *primâ facie* evidence of a debt. I almost doubt whether it is not an over-statement, to say it is even *primâ facie* evidence, for according to all the decisions I should say that a verdict even to be given in evidence must have ripened into

1864.
INSOLVENCY.
—
Ex parte
GREGORY.
In re
ROYCE.

1864.
 INSOLVENCY.
 —
Ex parte
 GREGORY.
In re
 ROYCE.

a judgment. At all events, without discussing that point, the only question considered in that case was not the efficacy of a judgment but the efficacy of a verdict, which had never ripened into a judgment. The next case cited is *Ex parte Bryant*, cited from 1 *Vesey & Beames*, in which there is a mere passing expression as to the petitioning creditor's debt. Taking the particular subject-matter of that case it was quite unnecessary for the learned Judge to decide the abstract proposition of how far a judgment could be reopened on a proof in bankruptcy. The argument there was based upon the expression in the Act that the creditor should make affidavit of "the truth and reality of his debt," and that expression does not occur in our Act as to anything I have now to deal with. The same case of *Ex parte Bryant* is also reported in *Rose's Bankruptcy Cases* (l), and there is there no passage corresponding with that which has been relied upon in the report in *Vesey & Beame's*, shewing with how little emphasis any such casual expression of opinion was delivered so as not to attract the attention of another reporter. The next case is *Ex parte Marson*. In that case the creditor of the bankrupt held a promissory note, which was alleged to have been given as for a gambling debt. He sued upon the note, and obtained judgment upon a *cognovit*; and the question arose as to how far his judgment so obtained was conclusive. The counsel in that case appears, upon an investigation of all the facts, to have given up all opposition, so that really any opinions that the Judges expressed upon the case were extra judicial; and as to some of them, purported to be made with that want of consideration with which opinions are expressed, when they are utterly immaterial for the real decision of the case. The other cases upon this subject are *Ex parte Prescott* (m), and *Ex parte Mudie* (n). In both of those cases the Court was dealing with objections which would have been a ground for the bankrupt himself to have obtained relief in a

(l) 1 *Rose*, 288.

(m) 1 *M. D. & De G.*, 199.

(n) 3 *Ibid.*, 66.

Court of Equity, so that they relate merely to the admissibility of equitable defences.

1864.
INSOLVENCY.

Ex parte
GREGORY.
In re
ROYCE.

On the whole, then, I think, referring to the language of our Act, the subject hardly admits of any doubt; and in all insolvency questions it is only our own Act we are to look to, and not to go off to English decisions and take it for granted without comparing the English Act with ours line by line, that those decisions are applicable. Also, I think, the balance of authority is unfavorable to reviewing a judgment, except upon the grounds of an equitable defence or of collusion between the insolvent and the creditor in obtaining the judgment, the latter being a ground which it is open to a creditor to raise, but not to the insolvent himself.

In this particular case the voluntary sequestration appears to have been with the express design of getting rid of this judgment. *Gregory* finding that he had been completely defeated at law threw his property into the Insolvent Court, with the expectation of having the question re-investigated there. I do not think the Insolvent Court is adapted to such an object, and on the whole I refuse this application with costs.

Appeal dismissed, with costs.

1864.

INSOLVENCY.

Dec. 1, 5, 8.

Upon motion under the rider to 10 Vic. No. 14, for the grant of an Insolvent's certificate, the consent of the creditors, and the fact that the parties consenting are all the creditors, should be verified by the affidavit of the solicitor of the Insolvent and not by the Insolvent himself.

Such application may be either by rule nisi on the official assignee or upon notice to him, or there may be a consent by the official assignee duly verified; but a single day's notice to the official assignee is not sufficient.

IN RE GILBERT HANDASYDE, AN INSOLVENT.

MOTION under the rider to the Act 10 Vic., No. 14 (o), for the grant of the Insolvent's certificate, two years having elapsed since its refusal (p).

Sir *George Stephen*, for the Insolvent, moved upon notice to the official assignee and upon the consent of all the creditors who had proved in the estate, verified by the affidavit of the Insolvent himself.

MR. JUSTICE MOLESWORTH.—I will look at the papers in this case.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH.—I have already suggested that in cases of this nature I think that the consent of the creditors and the fact that the parties consenting are all the creditors should be verified by the affidavit of the solicitor of the insolvent and not by the insolvent himself (q). I observe also that this motion is made upon a single day's notice to the official assignee, which I think insufficient. There was a case before Mr. *Chapman*, when sitting as Judge—*In re Connell* (r)—in which he stated that he thought there should be either a rule nisi on the official assignee or notice to him. I would be disposed to allow either, or there might be a consent by the official assignee duly verified; but certainly I should not consider a single day's notice sufficient.

No order.

(o) Ad., 763.

(p) Vide 1 Wy. & W., I. E. & M., 110.

(q) Vide *In re Perry*, 2 Wy. & W., I. E. & M., 86.

(r) 1 *Ibid.*, 182.

Upon this day, upon production of the consent of the official assignee and creditors, verified as required, the grant of the certificate was allowed by his Honor, who said he had looked through the report of the proceedings and the judgment of the Chief Commissioner, with the confirmation of the refusal of the certificate by Mr. Justice *Chapman*, which he considered was right according to law, but as this was not an aggravated case, he now felt himself justified in allowing the certificate.

1864.
INSOLVENCY.
In re
HANDASYDE.
December 8.

IN THE GOODS OF JOHN SLEATH HILL, DECEASED.

IN this case a will had been made which was not duly executed. A subsequent codicil had been made, which was duly executed. The latter contained a reference in general terms to a previous will.

Mr. *Lawes* moved for probate of both will and codicil, offering evidence to connect the two documents. He contended that the will was sufficiently referred to by the codicil to be incorporated with it, and referred to *Allen v. Maddock* (s), *Williams on Executors*, p. 85 ; and *Straubenzee v. Monck* (t).

Cur. adv. vult.

ECCLESIASTICAL.
February 25.
March 3.

Where a will was not duly executed, but a subsequent codicil duly executed referred to a previous will, Held that parol evidence might be admitted to connect the unattested will with the will spoken of in the codicil ; and probate granted of the will and codicil.

MR. JUSTICE MOLESWORTH.—In this case there was a previous will unattested ; but the codicil referred to a previous will, not specifically to this will, but to some previous will, and I think, on the authority of the case of *Allen v. Maddock* that I should grant probate of this will as the one referred to by the codicil. That case seems to me completely in point,

March 3.

(s) 11 Moore, P. C. C., 427.

(t) 32 L. J., Prob. 23.

1864.
ECCLESIASTICAL.

In the goods of
J. S. HILL.

as there was nothing in the second will there to identify the former will—on the contrary, there was a slight inconsistency between the two documents; but it was held there that parol evidence might be admitted to connect the unattested will with the will spoken of in the codicil. I think that case governs the present, and probate will therefore be granted of the will and codicil.

IN THE GOODS OF WILLIAM GRANT, DECEASED.

March 10.

So much of the executor's affidavit required by the Rules of Court, as relates to the verification of the will, is part of the materials upon which probate should be granted; and in the absence of this probate will not be granted, although the will is verified by another affidavit. The other part of the executor's affidavit may be in another document, and may be filed at any time before issue of the probate from the office.

MOTION for probate of the will of the testator. There was filed a joint affidavit of the executor and executrix, the jurat of which was informal, inasmuch as it did not state that each deponent wrote his or her name in the presence of the Commissioner (v).

Mr. Lawes for the motion.—All the facts necessary to found the motion for probate appear upon other affidavits properly sworn, and it is sufficient if the affidavit of the executor and executrix be filed in the office before probate be taken out.

MR. JUSTICE MOLESWORTH.—The executor's affidavit consists of two parts—one as to the verification of the will, and the other as to the duties and future acts of the executor in his office. On looking closely into the rules, though the practice may certainly have been otherwise in some cases, I think that the first part, which might be contained in a separate affidavit from the other part, is part of the materials upon which the probate should be granted, and that I ought not to grant this application, although the will is verified by another affidavit. The form given of the executor's affidavit confirms

this view. The other part of the executor's affidavit may be in another document, and may be filed at any time before issue of the probate from the office. In the present case, however, I shall grant probate, subject to the production in the office before probate issues of a proper affidavit.

1864.
ECCLESIASTICAL.
In the goods of
W. GRANT.

IN THE GOODS OF FREDERIC AMIET, DECEASED.

May 19.
June 2.

IN this case the deceased had conferred with his solicitor as to the preparation of a will, and the solicitor had taken short notes of the instructions, which were subsequently signed by the testator, in the presence of two witnesses. The only words in these instructions relating to the appointment of executors were the following :—

“Tres. & Exors.—*Louis Kitz*, of Geelong, watchmaker.
Robert McDonald, of Geelong, chemist.”

Mr. *Lawes* now moved for a grant of probate to *Kitz* and *McDonald* as executors. [*Molesworth*, J.—There is merely the office and two names of persons put together without any indication in writing that those persons are to fill the office. There are no operative words whatever.] If the words so put can bear no other meaning there is no ambiguity, and the Court will put the construction upon them that they appear intended to bear.

In a testamentary paper sought to be proved as a will, the only words relating to the appointment of executors were—
“Tres. and Exors.—*Louis Kitz*, of Geelong, watchmaker; *Robert McDonald*, of Geelong, chemist.”
Held, that as between the grant of probate, or of administration *cum testamento annexo*, probate might be granted.

MR. JUSTICE MOLESWORTH.—In this case I think I should require a very particular affidavit of the circumstances, and the whole history of the document, and that from both the witnesses, and also an explanation of why no other document was executed.

No order.

1864.
 ECCLESIAS-
 TICAL.

In the goods of
 F. AMIET.

June 2.

Mr. *Lawes* now renewed, on further materials, his application for probate, and cited *Wheeler v. Howell (w)*.

MR. JUSTICE MOLESWORTH.—I cannot say that if the question otherwise arose before me I would hold that under this mention of these gentlemen in this document, without any operative words, the legal estate would pass to them as devisees in trust. But the only question at present is whether I should grant probate, or administration *cum testamento annexo*. That is comparatively unimportant, and I think probate may be granted.

Probate granted.

(w) 3 K. & J., 198.

IN THE GOODS OF THOMAS CARROLL, DECEASED,
 INTESTATE.

July 14.

Although by the Rules of Court a caveat against application for letters of administration should be filed within a certain time, yet if at any time before the order is made a caveat is filed it has operation.

MR. ATKINS moved for letters of administration to a person claiming to be the widow of the deceased.

Mr. *Lawes*, for an opponent, stated that a caveat was entered.

Mr. *Atkins* submitted that, on the authority of *In re Donald Kennedy (x)*, he was entitled to have administration granted, no caveat having been filed at the time when the fourteen days' notice of intention to apply expired.

MR. JUSTICE MOLESWORTH.—There is evidently a substantial question to be tried; and that question must not be

(x) 1 Wy. & W., L. E. & M. 16.

tried on this application, but otherwise. It has always been held that, although by the *Rules of Court* the caveat should be filed within a certain time, yet if at any time before the order is made a caveat is filed, it has operation.

1864.
ECCLESIASTICAL.

In the goods of
T. CARROLL.

Administration refused (y).

(y) *Vide* next case.

IN THE GOODS OF ROBERT JONES, DECEASED.

MR. HOLROYD moved for a grant of letters of administration to the widow of the deceased.

Mr. *Billing*, for a creditor of the deceased, claimed to be heard in opposition to the motion by virtue of a caveat lodged by such creditor.

Mr. *Holroyd* objected. The caveat in this case was lodged too late. The *Supreme Court Rules*, cap. viii., r. 8, require that the caveat should be lodged within fourteen days next after the first publication of the notice of intention to apply. Here the advertisement of the intention to apply was published on the 18th October, and the caveat was not lodged until the 8rd November. In *In re Kennedy* (z) it was held that it is not necessary to search for caveats up to the actual time of application.

MR. JUSTICE MOLESWORTH.—Upon this point the question is whether a caveat lodged after the time prescribed by the Rules is to be totally disregarded. The practice has been to have an affidavit of no caveat up to the time of application. I qualified that in *In re Kennedy*, by holding that where an application had been made and postponed no new search for

November 10.

Upon an application for letters of administration the Court has a discretion as to letting in a party to be heard, although his caveat may have been lodged without the time fixed by the rules.

(z) 1 Wy. & W., I. E. M. 16.

1864.

ECCLÉSIASTICAL.

In the goods of
R. JONES.

caveats need be made. This application, however, is now brought forward for the first time, and I think the Court has a discretion as to letting in a party to be heard, although his caveat may have been lodged without the time fixed by the Rules. In this case the facts appearing upon the affidavits before the Court I think warrant me in exercising that discretion in favor of the creditor seeking to be heard.

*Objection overruled (a).**(a) Vide last case.*

IN THE GOODS OF HORATIO COOPER, DECEASED.

August 11, 12.

H. C. by his will desired that the whole of his properties, &c., be equally divided amongst his children, but not till after the decease of his wife to whom he entrusted during her life all his properties, &c., for the maintenance of herself and children, and left the management to his wife with the advice of trustees named.

Held, that probate could not be granted to the widow as executrix according to the tenor, but order made for a grant to her of administration *cum testamento annexo*, allowing her to enter into the administration bond without sureties.

HORATIO COOPER died, leaving a will which was, so far as material to the present purpose, in the following terms:—"I, *Horatio Cooper*, hereby bequeath the disposal of my "several properties, lands, monies, shares, or other goods that "may rightfully belong to me in the following manner, to "wit—I desire that the whole of my properties, monies, "shares, and other goods be equally divided amongst my "eleven children" (naming them) "but not till after the decease "of my beloved wife *Jane*, to whom I entrust during her "natural life all the properties, goods, monies, shares, &c., "belonging to my estate, so long as she remains unmarried, "for the maintenance of herself and my children who may "reside with her. I desire the following annual payments to "be made"—(here follow certain annuities to the testator's "sisters)—"and I would wish any monies that may be added "to my estate from its revenues that should not be required "by my wife for her's and my family's maintenance to be "added to the estate, but leave the management to my dear "wife, with the advice of my trustees, *John Stevenson, Robert Maiter*, and *Thomas Napier*."

Mr. J. W. Stephen now moved for a grant of probate to the widow of the testator, as executrix according to the tenor, and cited *In re Martin* (b).

1864.
ECCLESIASTICAL.

Cur. adv. vult. In the goods of
H. COOPER.

MR. JUSTICE MOLESWORTH.—I do not think that in this case I can grant probate to the widow as executrix according to the tenor; but I shall make an order for a grant to her of administration with the will annexed, allowing her to enter into the administration bond without sureties.

August 12.

Order accordingly.

(b) Sup. Ct. Vic., 18 Sep., 1862.

CARROLL v. CARROLL.

ECCLESIASTICAL Suit instituted to try the right to administration to an intestate's estate. Issue had been joined, and notice of the cause having been set down for hearing had been given to the Defendant. It now came on to be heard.

The Plaintiff not appearing,

Mr. Lawes, for the Defendant, submitted that the Court should make an order dismissing the bill, as the course prescribed by the *Supreme Court Rules*, cap. vii., sec. 13, on default in appearance, did not in terms dispense with the necessity of such an order.

October 3.

Where in an Ecclesiastical suit the Plaintiff does not appear at the hearing, an order dismissing the bill is not necessary, an entry by the Judge of the Plaintiff's default in appearance being alone requisite.

MR. JUSTICE MOLESWORTH considered that the order was not necessary. An entry by him of the Plaintiff's default in appearance was alone requisite, upon which the Defendant could proceed under the rule in the Master's office.

1864.

ECCLESIASTICAL.

Sept. 8, 22.

E. E., being domiciled in England, made a will there relating exclusively to property in Great Britain and appointed executors in England. He then came to Victoria and made a second will relating exclusively to property in Victoria and Tasmania, and appointed executors of it resident in Victoria. The Court of Probate in England having granted probate of the first will without referring to the second, the Supreme Court of Victoria granted probate of the second will without referring to the first.

IN THE GOODS OF EBENEZER RUFFHEAD, DECEASED.

IN this case the testator in 1862, being domiciled in England, made a will there relating exclusively to property in Great Britain, and appointed executors resident in England. He then came to Victoria and made a second will relating exclusively to property in Victoria and Tasmania, and appointed executors of it resident in Victoria. He subsequently returned to England, and there made a codicil to his first will, such codicil also relating exclusively to property in England. Probate of the first will and codicil to it were granted by the Court of Probate in England to the executors named in the first will, and without any reference being made to the second will.

Mr. Lawes now moved for a grant of probate of the second will only to the executors named in it, without reference to the first will or the codicil to it; and cited *In the goods of Pulman (c)*.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH.—In this case the testator executed three testamentary papers, the first and third relating specifically to property in Great Britain, the second relating to property in Victoria and Tasmania. The testator appointed executors for his English property, and other executors for his Australian property. It is clearly established that a person may appoint different executors of different portions of his property, but it generally occurs that the same instrument contains the different appointments. The peculiarity in this case is that the second will relating to property here has no reference to the first will, and the

codicil to the first will has no reference to the second will. The only point of connection between the three is that the codicil to the English will creates a charge for payment of debts, and makes the property comprised in it the primary fund for payment of the testator's debts wherever contracted. The doubt to which Mr. *Laves* called my attention was whether in granting probate of the second will I should or should not notice the first and third, which relate entirely to property in Great Britain. The case which I have found to throw the most light upon this subject is *Spratt v. Harris* (d). In that case the testator made a will relating to his English property, and a second will relating exclusively to property in France, but did not appoint an executor to either will. The widow sought administration, and was very anxious to have the second will included in the same grant of letters; and the Court decided that administration *cum testamento annexo* should be granted of both wills. The present case differs from that, in that here there are distinct executors for each distinct property, and I think the inference to be drawn from the language of the Court in that case is that if there had been distinct executors appointed there distinct probates would have been granted to each executor.

1864.
ECCLESIASTICAL.

In the goods of
E. RUFFHEAD.

I do not know whether the attention of the Court in England was drawn to this subject, but that Court has granted probate of the first and third papers without referring to the second. I think I should follow the same course, and grant probate of the second will without at all referring to the first or third.

Order accordingly.

1864.

ECCLESIASTICAL.

September 22.

Where a will consists of several sheets, the last of which only is signed by the testator, the affidavit in support of an application for probate ought to specify, and by some mark indicate, that each sheet was the subject matter of the testator's discretion, and each sheet of the will should be marked by the Commissioner before whom the affidavit is sworn as being referred to by the affidavit.

IN THE GOODS OF JOHN McMECKAN BLACK,
DECEASED.

MR. PURCELL moved for probate to two of the executors named in the will, leave being reserved to the remaining executors who were in England to come in and prove. The will was written on five sheets of brief paper. The *testimonium* clause was as follows:—"In witness whereof I the said *John McMeckan Black* have to this my last will contained "in this and the four preceding sheets of paper set my hand "this 4th day of July 1864." The will was only signed by the testator and witnesses at the foot of the fifth sheet, but the five sheets were fastened together with a piece of silk at the corner.

MR. JUSTICE MOLESWORTH.—According to *Williams on Executors* it must be presumed that the sheets were joined together if found so, unless there is evidence to the contrary; and it is not necessary where there are several sheets that each should be signed (e). In this case the attesting witnesses have looked only at the last sheet of the will, and the affidavits refer only to that sheet. I think in the case of a document of this kind, consisting of several sheets, the affidavit ought to specify, and by some mark indicate that each sheet was the subject matter of the testator's discretion; and I think each sheet of the will should be marked by the commissioner before whom the affidavit is sworn as being referred to by the affidavit of the witness. The application may be renewed on such further materials being produced.

No order.

(e) *Vide Williams on Executors*, 5th ed., p. 78.

IN THE GOODS OF MICHAEL HONE, DECEASED.

IN THE GOODS OF JOHN PENDER, DECEASED.

1864.

ECCLESIASTICAL.

Oct. 6, 13.

IN each of these cases application was made for a grant of letters of administration to an attorney under power of the next of kin of the deceased, resident in England. The evidence of relationship in each case consisted of statutory declarations made before some public functionary in England, accompanied by a notarial verification.

Upon application for letters of administration, the Court will not act upon statutory declarations where affidavits may be obtained.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH.—In these cases there are only statutory declarations as to the relationship of the alleged next of kin in England. There are in England commissioners of this Court for taking affidavits, and I do not feel disposed to act upon statutory declarations where affidavits may be obtained.

October 13.

Applications refused.

IN THE GOODS OF JAMES STEPHENSON, DECEASED.

November 3,
4, 10, 14,
Dec. 14, 24.

JAMES STEPHENSON, by his will, executed in London, and dated the 14th December, 1861, after various specific bequests, gave the residue of his personal estate to *James John Marshall*, of Melbourne, in the colony of Victoria; *John Stuart*, of Sandhurst, in the same colony; *Alexander Moncrieff*,

A testator left a will and three codicils. The second revoked certain legacies, confirmed another, and appointed two

additional executors. The third did not notice the second, but revoked the legacies previously revoked, and also that previously confirmed, and confirmed the will in every particular not thereby altered or revoked.

Held, by the full Court, reversing *Molesworth, J.*, that the third codicil in no way affected the appointment of executors by the second codicil, and probate of the will and three codicils granted.

1864.
 ECCLESIASTICAL.
 In the goods of
 J. STEPHEN-
 SON.

of Ireland; and *Marcus Candido de Rozario*, of Hong Kong, upon trust for sale and conversion, and for payment of certain legacies *inter alia*, to *Robert* and *Catherine Stuart* £500 each, and to each of his executors £500; and he appointed the said *J. J. Marshall*, *J. Stuart*, *A. Moncrieff*, and *M. C. de Rozario* trustees executors of his will. By a codicil also executed in London, and dated the 18th February, 1862, the testator bequeathed to *Andrew Lysaigh Inglis* £500, and confirmed his will in every other particular. Another codicil was executed by the testator in Melbourne, and dated the 21st May, 1862, the material parts of which were as follows:—"I hereby revoke "so much of the said will as appoints *John Stuart* as one of "my executors, and further revoke the bequest of £500 to "*Catherine Stuart*; and I further revoke the bequest of £500 "to *Robert Stuart*, but do not revoke the bequest of a like sum "therein made to the said *John Stuart*, although he ceases to "remain my executor; and I appoint as executors of my will "aforesaid, in addition to *J. J. Marshall* and *A. Moncrieff*, "therein named, *Robert McMicking*, of Melbourne, and *George "Frederick Agnew*, of same place." Subsequently the testator executed in England another codicil, dated the 4th July, 1863, reciting the will of the 14th December, 1861, and the codicil of the 18th February, 1862, but not mentioning the codicil of the 21st May, 1862, and proceeding as follows:—"Now I do hereby revoke and make void the appointment of "the said *John Stuart* as one of the executors of my said will; "I also revoke the legacy of £500 so given to him as afore- "said; also the two legacies of £500 each given to the said "*Robert Stuart* and *Catherine Stuart*; and, lastly, I hereby "revoke the legacy of £500 to *A. L. Inglis*. And I declare this "present writing to be a codicil to my said will; and I con- "firm my said will in every particular thereof that is not "hereby altered or revoked."

The testator died in England on the 8th April, 1864, and probate of the will and the two codicils of the 18th February, 1862, and 4th July, 1863, was granted by the Court of Pro-

bate in London. The codicil of the 21st May, 1862, had been left by the testator in Melbourne, and no application was made to the Court in England for probate of this codicil.

1864.
ECCLESIASTICAL.

In the goods of
J. STEPHENSON.

Mr. J. W. Stephen now, upon production of an exemplification of the English probate of the will and codicils proved in England, and upon affidavits verifying the codicil of the 21st May, 1862, and shewing that *A. Moncrieff* and *M. C. de Rozario* were out of the jurisdiction, and that *McMicking* had renounced, moved for a grant of probate of the will and three codicils to *J. J. Marshall* and *G. F. Agnew*. He cited *Crosbie v. MacDoual* (f), *Smith v. Cunningham* (g), and *Rogers v. Goodenough* (h).

Cur. adv. vult.

MR. JUSTICE MOLESWORTH.—I think the question in this case is reduceable, according to the authorities, very much to a matter of the intention of the testator. The effect of the second codicil was to do away with two legacies, expressly to continue the legacy to *John Stuart*, previously appointed executor, but to revoke his appointment as executor, appointing as additional executors *McMicking* and *Agnew*. The subsequent codicil, partly repeating the provisions of that as to legacies, and confirming the will appointing certain executors, appears to me to treat as a nullity and be inconsistent with a prior codicil appointing additional executors. The case bearing most upon the question is *Crosbie v. MacDoual*. In that case the testator reserved to himself the probability of making codicils. He subsequently made some codicils, and lastly, made a codicil which altered the executors, and in all other respects confirmed his will; and that was held not to be a revocation of the previous codicils which had altered the bequests substantially. This case seems to me to be totally different from that. Here the third codicil recites the will

November 14.

(f) 4 Ves., 610.
(g) 1 Add., 448.

(h) 2 Sw. & T. 342; and 31 L.J., Prob. 49.

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and the first codicil, takes no notice of the codicil altering the persons already executors, and confirms the will in all other respects. I think I can only admit to probate the will and the first and third codicils, and cannot regard the executors appointed in the second codicil.

December 14.

From the Order of his Honor refusing probate of the will and three codicils to *Marshall* and *Agnew*, they now appealed to the full Court (j), on the ground that the codicil of the 21st May, 1862, was not revoked by the codicil of the 4th July, 1863, and that the will of the 14th December, 1861, and the three codicils ought all to be admitted to probate, as constituting together the last will and testament of the said *James Stephenson*.

Mr. *J. W. Stephen*, for the Appellants, cited the same cases as in the Court below.

No appearance *contra*.

Cur. adv. vult.

December 24. THE CHIEF JUSTICE :—

In this case probate of a second codicil to the testator's will has been refused. The testator left a will and three codicils. The first is not in question. The second revoked certain legacies, confirmed another, and appointed certain persons to act as executors. The third, not noticing the second, revoked over again the legacies previously revoked, revoked also the legacy previously confirmed, and did not mention the executors. So far as conjecture can extend, there may be no doubt that the testator, in executing the third, had forgotten the existence of the second codicil ; but it does

(j) *Coram Stawell, C. J.; Barry, J.; and Williams, J.*

not appear to us that that necessarily effects a revocation of it. If, as put at the bar, and as we think, a will and codicils are to be taken as written on one piece of paper, it clearly amounts to this—that the testator in a certain clause in his will inserted a bequest of certain legacies, and the appointment of certain persons as executors. He then proceeded, in another portion of his will called a codicil, to revoke certain of those legacies and appoint other persons as executors. Then in another clause of his will, under the name of another codicil, he revoked over again those legacies referred to in the earlier portion of the will, but made no allusion whatever to the appointment of executors. There is no inconsistency here. The revocation of legacies by the third codicil in no way affects, in our opinion, the appointment of executors by the second codicil, and to take into consideration that the testator might have forgotten the second codicil, would be dealing with mere conjecture. We think, therefore, that the applicants are entitled to probate of the will and three codicils.

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Appeal allowed.

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7, 13.

On a petition by the husband for divorce, it appeared in evidence that there had been a series of three distinct acts of adultery by the wife, each successively condoned by the husband without reference to any act of penitence on the part of the wife; that being fully alive to the wife's tendency, the husband, when she left his house, took no steps to ascertain where she had gone, or what she was doing; and, that the act of adultery on which the petition was based was committed during such absence.

Held, that the petitioner had been guilty of misconduct conducing to the adultery.

With reference to a charge of having, by his conduct, conduced to his wife's offence, it is right that the whole conduct of the petitioner, in reference to his marital duties, from the contract of marriage to the commencement of the suit, should be considered.

Where the evidence did not shew that the petitioner desired, intended, contemplated, or winked at his wife's offence,

Held, that a charge of connivance was not established.

Where recriminatory charges have been preferred by the wife and failed, and where the wife has been guilty of a series of acts of adultery, the Court will not grant her alimony.

Where no redress can be obtained against the co-respondent he ought not to be called upon to pay costs.

Although the Court may itself take cognizance of objections to a petition by the husband for divorce on the ground of neglect, connivance, or condonation, if they appear upon the evidence, the respondent cannot urge them unless raised by the pleadings.

After judgment has been given on a petition by the husband for divorce, if it is adverse to the wife, and she can establish a *prima facie* case entitling her to alimony, she may apply to the Court to postpone the registration of the decree, and a convenient time may be fixed when the motion for alimony can be entertained, but it is absolutely essential that there should be evidence establishing a *prima facie* title to alimony.

(k) Coram *Stawell, C. J.*; *Barry, J.*; and *Williams, J.*

TERRY v. TERRY AND MURCUTT (k).

PETITION by *Alfred Terry* for dissolution of marriage, on the ground of the wife's adultery with the co-respondent and others.

The Respondent, by her answer, denied the adultery; pleaded that if she were guilty of it, when drunk and insensible of what she did, her husband had condoned it; charged her husband with the cruelty of coldness and neglect; and recriminated that he committed adultery with a woman named. The co-respondent, by his answer, denied the adultery charged against him. The facts, so far as material to this report, appear in the judgment of the Court.

The Respondent, by her answer, denied the adultery; pleaded that if she were guilty of it, when drunk and insensible of what she did, her husband had condoned it; charged her husband with the cruelty of coldness and neglect; and recriminated that he committed adultery with a woman named. The co-respondent, by his answer, denied the adultery charged against him. The facts, so far as material to this report, appear in the judgment of the Court.

Mr. Moore and Mr. J. W. Stephen for the Petitioner.

Mr. Lawes and Mr. Spensley for the Respondent.

Dr. Mackay for the co-respondent.

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At the close of the Petitioner's case, Mr. Lawes submitted that the evidence already before the Court shewed that the case came under the provisions of the 18th section of the Act, which barred a petitioner's claim for divorce, where neglect, connivance, or condonation was established.

Mr. Moore for the Petitioner.—This defence is not raised by the Respondent's answer, and allegations to this effect cannot be argued except they have been pleaded.

Mr. Lawes *contra*.

PER CURIAM.—Although the Court may itself take cognisance of objections of this nature, if they appear upon the evidence, the Respondent cannot urge them unless raised by the pleadings.

Mr. Lawes and Mr. Spensley then addressed the Court on the merits, on behalf of the Respondent.

Dr. Mackay was heard on behalf of the co-respondent, in support of his denial of the adultery charged; and submitted that, should the Court decide otherwise, there having been condonation on the part of the Petitioner, he should have no costs.

Cur. adv. vult.

THE CHIEF JUSTICE:—

May 13.

The petition in this case was by the husband against his wife and the co-respondent, on the ground of adultery. No

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damages were sought against the co-respondent, as the adultery alleged with him had, it appeared, been condoned.

The petition charged against the Respondent several acts of adultery. Of these, although some have admittedly been condoned, the last of them has not been so. The Respondent, in her answer, denied these alleged acts of adultery. She herself was called as a witness, but she was not examined as to this charge; and it appears to us that, coupling the omission to examine her with the evidence adduced, there has been sufficient proof of this act of adultery. A counter charge of adultery was made against the Petitioner. That charge, we are of opinion, signally failed.

The Petitioner is charged with "connivance," within the meaning of the 17th section of the Act; or, at least, with "misconduct conducing to the adultery," within the proviso to the 18th section of the Act. We do not think that the case of connivance is proved. The evidence does not show that the Petitioner desired, intended, contemplated, or winked at his wife's offence. He used means to keep her at home, and even went the length of depriving her of such portions of her clothing as he thought necessary for her use out of doors, with a view of keeping her at home. I do not think that there is proof that the hotel to which his wife resorted was notoriously so ill conducted as that her being there was sufficient to arouse his suspicion, or call upon him to act in the same way as he would have been called upon if it had been a house of ill fame. We therefore think that the charge of connivance was not established.

But there remains the charge of having, by his conduct, conduced to his wife's offence. With reference to that, it is right that the whole conduct of the Petitioner, from the contract of marriage to the commencement of the suit, should be considered—his conduct in reference to his marital duties alone; for we are clearly upon the authorities not allowed

to look at any other offences of omission or commission by him. In the abstract it may be that condonation and forgiveness of such an offence are rather meritorious than otherwise, as they show a disposition to pardon the deepest injury a man can receive—a course which may have a salutary effect on a generous woman. But, on the other hand, there is no doubt that such pardon repeated over and over again may at last cease to produce any good effect, and actually bring about a repetition of the offence. If adultery be forgiven the third time it may be regarded as almost leading to adultery for a fourth time. There is no express decision in such a case, but there is one in which a husband who condoned an adultery the day after it took place, was held to have condoned to a second adultery on the day after the condonation. In the present case, the Petitioner, immediately after being informed by his wife of her first act of adultery, which he says he did not believe when she herself told him, although he believes it now, resumed cohabitation with her. Some time passes, and she again offends. He again forgives her, and she is again guilty. After an interval of some months, he resumes cohabitation even again—though, on that occasion, it is alleged, under a misapprehension of the legal effects of such condonation. Thus there is a series of three distinct offences and condonations—every one of the latter without reference to any act of penitence on the part of the wife. Such repeated condonations exhibit a disposition to treat the marriage tie as a mere means of gratifying animal passion, rather than a source of enjoyment from the mutual society of the husband and wife. Aware of these numerous offences, committed both when intoxicated and—certainly as to one of them—when sober, with no excuse for that act at least, he condones all, and resumes his life with her as before. But the worst part of the whole case, in our opinion, is that, when fully alive to this woman's tendency, whether intoxicated or sober, he, when she left his house, took no step to ascertain where she had gone, or what she was doing. So far as he was concerned, she might have been during the whole of the time in a much

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worse place than the hotel to which she went. The adultery of which he now complains was committed during that time, and we think he brought it on himself. Such a suitor is not one for whom this Court is open to give the full measure of relief which it can administer.

The Court has in each case to decide what is, and what is not, misconduct conducing to adultery. Its task in such cases is a difficult and delicate one, as there are not the distinct rules laid down for such cases that there are in others. But the duty of the Court is one from which it will not shrink. We think that the Petitioner has, by his own conduct, precluded himself from obtaining a dissolution of marriage. There is, however, nothing to prevent his being decreed a judicial separation. In reference to that, the acts of condonation are excluded by the law from our view of the case. If he desire a judicial separation he is entitled to a decree so far.

As to costs, inasmuch as no redress can be obtained against the co-respondent, the case of *Robinson v. Robinson and Lane* (l) seems to be decisive that he ought not to be called upon to pay costs; and in that case the question of costs was commented upon in such a way as to shew that the Court inclined to think he would not or might not get his costs. Chief Justice *Cockburn* there said that if Dr. *Lane's* counsel thought fit they might renew the application for costs, but there is no report of any subsequent application. We do not think, under all the circumstances of this case, that the co-respondent should get his costs from the Petitioner. The petition is therefore dismissed as against the co-respondent, without costs; and granted as against the Respondent, for a judicial separation only.

(l) 29 L. J., Prob. & Mat. 194.

Mr. *Laves*, for the Respondent, asked for a postponement of the registration of the decree, in order that application might be made for permanent alimony, and for the custody of the children of the marriage. In *Vicars v. Vicars* (*m*), it was held that the order for permanent alimony must be embodied in the decree dissolving the marriage; and in that case, the decree having been registered before the application for alimony was made, the Court, although expressing every inclination to grant alimony, was of opinion it had no jurisdiction to do so. As to the custody of the children, *Wallace v. Wallace* (*n*) was cited.

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Mr. *Moore* and Mr. *J. W. Stephen* for the Petitioner.—This application is now too late. But if not, there are no facts before the Court upon which alimony can be granted. In this case the wife is not entitled to alimony. *White v. White* (*o*).

Mr. *Laves*, in reply, referred to the foot-note to *Vicars v. Vicars* (*p*), to the effect that in several suits for judicial separation the Court had suspended the registration of the decree in order that application for alimony might be made.

THE CHIEF JUSTICE.—We think that in the first instance the wife ought to shew a *prima facie* case of being entitled to alimony before the registration of the decree is suspended to enable her to apply for it.

Mr. *Laves* was heard in support of the Respondent's *prima facie* right to alimony.

THE CHIEF JUSTICE.—There is some difficulty about the practice, in consequence of the decree in England being *nisi* only in the first instance, but here absolute. On the

(*m*) 29 L. J., Prob. & Mat. 20.
(*n*) 32 *Ib.*, 34.

(*o*) 6 Jur., N. S., 28.
(*p*) *Ubi supra*.

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whole, we think that the more convenient course is that adopted by Mr. *Laves*. We do not think it would be well to mix up with the arguments in the main cause arguments as to the question of alimony. After the judgment has been given, if it is adverse to the wife, and she can establish a *prima facie* case entitling her to alimony, she may apply to the Court to postpone the registration of the decree, and a convenient time may be fixed when the motion for alimony can be entertained. We make these observations in order that the practice may be understood; but I may express my opinion that it is absolutely essential that there should be evidence establishing a *prima facie* title to alimony.

As regards the present case, holding the Respondent entitled to alimony would be offering a premium for misconduct of the grossest nature. Where, as in this instance, recriminatory charges have been preferred by the wife and failed, and where the wife has been guilty of a series of acts of adultery, to grant her alimony would be to pursue a course never sanctioned by any Court in England. We see no reason to depart from the opinion expressed in *Carnaby v. Carnaby* (q), namely, that where adultery is proved the granting of alimony should be a very exceptional case, and require very strong facts to induce the Court so to act.

(q) 1 Wy. & W., I. E. & M. 197.

McNULTY v. McNULTY (r).

SUIT by the wife for judicial separation, on the grounds of cruelty and desertion.

Mr. J. W. Stephen, for the Petitioner, moved, under the proviso to the 28th section of the Act No. 125, and the 7th of the *Divorce Rules of Court*, that service of the petition and citation upon the Respondent might be dispensed with. The only affidavit upon which he moved was that of the Petitioner verifying the petition, which stated that the Respondent had absconded from the hotel at which he had been staying, and that the Petitioner had been unable, after diligent enquiries, to gain any intelligence of him, and believed from the answers to her enquiries, that he had left the colony.

MR. JUSTICE MOLESWORTH.—I think I should require the affidavit of some other person, stating where the Respondent is supposed to be. I would then direct substituted service by advertisements in that place; but I do not think I should dispense with service altogether.

July 7. Mr. J. W. Stephen now applied, on further affidavits, for substitution of service on the Respondent. The affidavits went to shew that Defendant had gone to Sydney or New Zealand as soon as the present proceedings were commenced.

HIS HONOR made the order for substitution of service by advertisement in a newspaper in each of the cities of Melbourne, Sydney, and Dunedin, setting forth the prayer of the petition, the citation, and this order. The citation to be returnable in three months after publication of last advertisement.

(r) Coram *Molesworth, J.*

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June 30.
July 7.

In a suit by the wife for judicial separation where the respondent had absconded, and the petitioner stated upon affidavit that she had been unable, after diligent enquiries, to gain any intelligence of him, and believed from the answers to her enquiries that he had left the colony, the Court refused to dispense with service upon the respondent; but upon further affidavits stating where the respondent was supposed to be, directed substituted service by advertisements in that place.

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November 25.

Interim orders for the custody and maintenance of children may be made under sec. 22 of "The Divorce Act," where the children have no property.

The same presumption as to the wife's innocence will be made on an application for the custody and maintenance of children under sec. 22 of "The Divorce Act," as on an application for alimony.

JONES v. JONES (s).

THIS suit was by the husband for dissolution of marriage on the ground of the wife's adultery. A petition for alimony had been presented, and alimony decreed at the rate of £1 per week. The Respondent was subsequently delivered of a child. She thereupon caused a summons to be served on the Petitioner, calling upon him to shew cause why she should not have the care and custody of the child, and why he should not maintain it. Her affidavit in support of the summons stated that the Petitioner was the father of the child; that she was prevented by a sprained arm from earning anything for her support; that her confinement and the increased cost of living on diet sufficiently liberal for nursing rendered the alimony already allowed inadequate, and that if the amount awarded were increased by the sum of 15s. weekly she could maintain and support herself and child. The husband's income was £250 per annum, arising from his industry, not from property. The summons was adjourned from Chambers into Court, under section 43 of the Act No. 125.

Mr. Lawes for the summons.

Mr. Atkins *contrâ*.—This is an application made under the 22nd section of "The Divorce Act," and under that section the Court has no power to make the order sought. The provision for maintenance and education there spoken of is only intended to be made where infants have property which can be so applied. Here there are no funds of the infant, and the Court can, therefore, make no order as to the custody or maintenance. It is intended that this jurisdiction should be exercised as in Equity, and in Equity, having no property, she could not be made a ward of Court. *Curtis v. Curtis* (t), *Marsh v. Marsh* (v), *Boynton v. Boynton* (w). The husband,

(s) Coram Molesworth, J.

(t) 1 Sw. & Tr., 214.

(v) 1 Sw. & Tr., 312.

(w) 2 *Ib.*, 275.

in his affidavit verifying the petition in the main cause, has stated that his cohabitation with the Respondent ceased at a time precluding the possibility of his being the father of the child whom he is asked to maintain.

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Mr. *Laures* in reply.—The answer of the wife alleges intercourse with the husband sufficiently recent to admit of the legitimacy of the child. In her affidavit she distinctly declares it to be his. The Court, even in the absence of so direct an answer to the Petitioner's allegation, cannot, in a preliminary inquiry, pre-determine the main question in the suit, and pronounce the wife an adulteress. The presumption of legitimacy cannot be rebutted at this stage. The petition for alimony, not the proceedings in a suit in Equity, must be looked to for an analogy to the present application; and the practice of granting alimony, and the whole scope of the Act, shew that the husband's income, from whatever source arising, is a fund out of which his children are to be supported, and that it is in no case necessary in order to give jurisdiction that the children should have property of their own.

MR. JUSTICE MOLESWORTH.—The Act was intended to meet cases arising in all ranks of society, and it would be a rigid and narrow construction of the 22nd section to confine it to cases in which infants have property to be dealt with. Maintenance stands on the same footing as alimony, and I have no doubt as to the jurisdiction.

Coming to the facts, the legitimacy of the child is disputed; but I think that, as in the case of granting alimony, the wife's innocence is, for the purposes of the application, to be presumed. I think that in the present case additional support should be awarded, but I am not told how much is required. Fifteen shillings a week is mentioned, but I have no proper materials from which to ascertain how much less would be sufficient. The addition proposed seems most disproportionate to the additional expense which the birth of the child entails; and I am not disposed to open the question as

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to the allowances for the wife herself. I cannot take into account the expenses of the confinement or the Respondent's present inability to work, but I shall allow for the child an increase at the rate of six shillings a week.

*Order made for payment at that rate
 until hearing or further order.*

December 13.

Service of a citation in England may be verified by the affidavits of persons resident there, if explicit and satisfactory.

CONSTABLE v. CONSTABLE AND STREBINGER (x).

PETITION by the husband for a dissolution of marriage on the ground of the wife's adultery.

Mr. *J. W. Stephen* and Mr. *Lawes* for the Petitioner.

The suit was undefended by the Respondent and co-respondent.

The Respondent had been served with the citation in England, and service was verified by the affidavits of persons resident there.

THE CHIEF JUSTICE.—This is the first occasion on which service has been proved by affidavit. Such proof is received under the English practice; but in accepting these affidavits as sufficient evidence, we do so as the service was effected out of the jurisdiction, and the affidavits are explicit and satisfactory. We must not be understood as laying down a general rule that a mere formal affidavit of service abroad will satisfy the Court, or that where service is effected within the jurisdiction, or even in the adjacent colonies, it may be proved by affidavit (y).

(x) *Coram Stawell, C.J.; Barry, J.; and Williams, J.*

(y) *Vide Jewell v. Jewell, 2 Wy. & W., L. E. & M. 136.*

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ACTION.

I. *Non-exercise of a "discretion" given by law.*

Under the "*Melbourne Corporation Act*," 6 Vic., No. 7, secs. 1 and 80, a full discretion is given to the Corporation as to whether or not, and when, they should "form" any

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proposed street. *Held*, that where the Corporation had not yet exercised its discretion by "forming" a street in a certain place, and a person was injured by falling into an unfenced hole there, the Corporation was not liable. *Grieve v. Corporation of Melbourne*, L. 95

II. *Lies against Corporation for negligent care of streets.*

A municipal Corporation had power to permit miners to mine upon and under the public streets within the corporate boundary, subject to conditions and restrictions for the public safety such as the Corporation might think fit to impose. The Corporation granted such permission, subject to conditions and restrictions such as it thought fit. The miners after mining left their excavations in the streets in a condition such that water-pipes burst, and a chasm was made, into which a person, without neglect, drove his horse, and suffered damage and loss. The owner of the horse brought his action against the Corporation, and recovered damages. On rule *nisi* for a nonsuit, and on demurrer, both argued together, *Held*, that the power to grant permission to mine did not absolve the Corporation from the responsibility cast on them as managers of the public streets to take care that those streets were preserved in good order; that the Corporation was liable; and that the Plaintiff's pleadings and verdict must be sustained. *Badenhop v. Mayor, &c., of Sandhurst*, L. 137

III. *Against heir in possession of lands descended, for simple contract debt of ancestor.*

In an action at law against the heir in possession of lands des-

cended, to recover the debt of the ancestor, it is not necessary to shew that the Plaintiff has first exhausted the personalty. *McEwan v. Moncur*, L. 9

IV. *Against heir: cumulative remedy against descended realty for debt of ancestor, under 54 Geo. III., cap. 15, sec. 4.*

The Statute 54 Geo. III., cap. 15, sec. 4, gave a new and cumulative remedy at law to the simple contract creditor against the realty, without forcing him, at least at law, to exhaust first his redress against the personalty. *Ibid.*

V. *Where money had and received will not lie.*

The *B. Road Board* demanded payment of a road rate from *K.* It was admitted that the rate was regularly struck, but contended that *K.*'s assessment was too high, some pasture having erroneously been rated as arable. *K.* paid the whole demand under protest, and brought an action in the County Court for the excess as for money had and received. On appeal, *Held* (1) that *K.* could not have quashed the rate on *certiorari*, nor have replevied for the excess paid under protest. (2) That *K.* was bound to tender the amount really due, and might after such tender have brought his action if a distress were issued for any excess beyond the sum really due and tendered. (3) That "money had and received" did not lie in such a case, as the validity of a rate could not be inquired into in such an action. (4) That as money had and received did not lie, the judgment was erroneous, and the appeal must be allowed. *Belfast Road Board v. Knox*, L. 133

I. *Caveat against granting.*

See PRACTICE (ECCLESIASTICAL) II.

II. *Cum testamento annexo.*

See PRACTICE (ECCLESIASTICAL) III., V. 1.

III. *Letters of: Order for, not taken out.*

See PRACTICE (EQUITY) I.

ADULTERY.

See MISCONDUCT CONDUCTING TO ADULTERY.

ADVERTISEMENT.

See DEED, I.

PRACTICE (INSOLVENCY), VII.1. WINDING-UP ACT.

AFFIDAVIT.

See PRACTICE (ECCLESIASTICAL) I.
 ——— (EQUITY), II.
 ——— (INSOLVENCY) I., III. 1.

AGENT.

See BILL OF EXCHANGE.

PRACTICE (EQUITY), XV.

Authorised to demand possession for Crown: district surveyor.

Semble, that the district surveyor is not an authorised agent to make a demand for the Crown, of possession of Crown lands. *Regina v. Dallimore*, L. 153

ALIMONY.

See PRACTICE (DIVORCE, &c.) I.

Where on a petition by the husband for divorce on the ground of the wife's adultery, recriminatory charges have been preferred by the

ALIMONY.

wife and failed, and where the wife has been guilty of a series of acts of adultery, the Court will not grant her alimony. *Terry v. Terry*, I. E. & M. 78

AMENDMENT.

See SEQUESTRATION II. 2.

ANNUITANT.

See PRACTICE (EQUITY) XIV.

ANSWERS, FALSE.

See CERTIFICATE, REFUSAL OF, II.

ANTICIPATION.

Restraint on.

See HUSBAND AND WIFE I.

APPEAL.

I. From County Court.

Under the Act No. 159, sec. 11, enacting that the Appellant shall "within one week after receiving "such case transmit the same" to the Supreme Court, the appeal case must be in the hands of the officer of the Supreme Court within the seven days, or it will have no jurisdiction, and the case will not be heard. *Stirling v. Hamilton*, L. 14

II. From Warden to Court of Mines.

See REHEARING.

1. B. and another, owners of pumping machinery on a golden quartz-reef, applied to a Warden, under the Act No. 153, to make a drainage assessment on each of the thirty-two claims on the reef. The Warden made his decision in each case, and signed a minute of each decision. On a separate sheet he made a further order, imposing "conditions"

APPEAL.

on the owners of the machinery. E. and others, owners of one of the thirty-two claims, appealed to the Court of Mines. They gave no notice of their appeal to the other claim-holders. On the appeal, the copy minute produced by the Appellants, was that which was furnished to them under the Act No. 32, namely, a copy of the "decision" entered in each case, without the separate "conditions" imposed on the owners of the machinery. On questions stated by the Judge, under No. 32, sec. 70, *Held* (1) that the objection as to the non-production of a copy of the minute of the "conditions" would be best met by allowing the Appellants to correct the mistake, arising from the inadvertence of the Warden, and obtain and produce a proper copy of the full decision—adjourning the Court, if necessary, for that purpose—on such terms as the Judge might think equitable. (2) That it was sufficient on the appeal, if the parties to the proceeding in the Warden's Court then appealed from, were before the Court of Mines. *Early v. Barker*, L. 32

2. Where, on a complaint before the Warden of a gold-field, the Warden refuses to interfere, there is no appeal to the Court of Mines. *Bray v. Mullen* and *Power v. McDermott* reviewed and acted upon. *Wardle v. Evans*, L. 188

III. From Refusal of Certificate.

See CERTIFICATE, REFUSAL OF.

IV. To Petty Sessions against road rate.

1. G. appealed to Justices under the Act No. 176, sec. 199, against a road rate. The *Corio Road Board* (Respondents before the Justices)

objected that the notice of appeal specified no day of hearing. The Justices decided against the rate, but adjourned to allow G. an opportunity of giving a fresh notice specifying a day. A fresh notice was given, specifying a day. On that day both parties appeared again, and the Respondents raised the further objection that the appeal had then by the adjournment become too late. The Justices heard the appeal and decided against the rate. The *C. Road Board* appealed to the Supreme Court, and relied there not only on the two objections above-named but on another objection to the notice, not taken at all before. *Held*, that at the adjourned hearing the Respondents waived the first objection, and were estopped from taking the second; and that on the present hearing the third could not be taken. *Corio Road Board v. Galletly*, L. 85

2. *Semble*, that a notice of appeal to Justices in Petty Sessions from a road rate should on the face of it shew that the person appealing against the rate is a party aggrieved thereby within the meaning of the Act No. 176, sec. 199; and that if the notice describe such person as the "owner or lessee" and not as the "occupant" of the land, he will not appear to be a party aggrieved within the Act. *Ibid.*

3. *Semble*, that a notice of appeal to Justices in Petty Sessions from a road rate under the Act No. 176, sec. 199, should name a day for the hearing, and the hearing may be the first day after such day named, on which the Justices actually sit in Petty Sessions. *Ibid.*

APPEAL SITTINGS.

See JURISDICTION, III.

APPOINTMENT.

Of new Trustees.

See TRUSTEE, 3.

ARBITRATION AND AWARD.

I. *Making submission a Rule of Court.*

See PRACTICE (EQUITY) III.

II. *Costs of.*

An attorney's clerk sued for salary, and the attorney pleaded a set-off for a delivered bill of costs. The action was referred to arbitration, and one of the terms of the reference was "costs of action reference and award to abide the event of the award." The arbitrator awarded a "balance" to the Plaintiff, after giving the Defendant a credit on account of his set-off. The prothonotary, in taxing costs, held that although the Defendant had succeeded on his plea of set-off, yet the Plaintiff by obtaining an award for a "balance," had obtained "the event of the award," and was entitled to costs. On rule *nisi* to review taxation, *Held*, that the prothonotary was right, and rule *nisi* discharged. *Woolcott v. Wiscould*, L. 129.

ARREST.

Of transient offender who gives his name and residence.

In the "*Management of Railways Act*," No. 186, sec. 31, enacting that an officer of the company may seize and detain an offender whose name and residence shall be unknown to such officer, and give him in charge to a police constable, who shall without warrant convey him with all convenient despatch before a justice, the object of the section is to enable the officer to arrest a transient offender whose name and

residence the officer does not possess the means of ascertaining. If information on which the officer ought to act is offered, his declining so to act, with the means of knowledge at hand, will not leave the offender's name and residence "unknown" to the officer. In each case the jury must decide whether the information offered to the officer before the arrest is sufficient or not. The officer must at his own risk arrest a person whose name and residence he had the means of knowing. *Jenkyns v. Elsdon*, L. 145.

ARTICLED CLERK.

I. *Bond fide service of articles.*

Three recent English cases considered, and held not inconsistent with *In re Garrard*, 2 Wy & W., Law 229. *In re Garrard*, L. 128.

II. *Filing articles nunc pro tunc.*

Motions for leave to file articles of clerkship *nunc pro tunc* should be made to the full Court. *In re Crabbe*, E. 66.

ASSETS.

In hands of Heir.

See ACTION III., IV.

ASSIGNMENT.

In trust for creditors.

See TRUSTEE, 2.

ASSOCIATION.

The Victorian Association was established, as stated by its prospectus, for the purpose of seeking out and promoting by all lawful means in its power the return to Parliament of men of liberal and enlarged views, who by experience, education, and character, were calculated to

command the respect and enjoy the confidence of their fellow colonists, and would in their political career be guided by a tenacious regard for the public welfare rather than by a desire to obtain the temporary approbation of any section of the community. On a case stated without pleadings, between the joint treasurers of the society and one of the members, in an action on the undertaking of the latter to subscribe to the funds of the society. *Held*, that the association was not illegal, nor the member's undertaking a void one; and judgment given for the Plaintiffs. *Ryan v. Stephens*, L. 102.

ATTACHMENT.

See PRACTICE (EQUITY) IV.

BARRISTER.

Admission of candidate engaged in "trade or business."

1. Rule 9 of cap. ii. of the *Supreme Court Rules* requiring that every person applying to be admitted to practise as a barrister, "must not be engaged in trade or business," during the next three years preceding the time he submits himself to be examined, strictly speaking excludes a candidate who during one period of three months in the three years next preceding submission to examination had been clerical assistant of the accountant of the Victorian railways; but the question being newly raised, the applicant having treated the Court with candour, and members of the Court being under a misunderstanding somewhat pledged, the Court admitted the candidate specially under the exceptional circumstances, for-

bidding the case to be regarded as a precedent. *In re Goslett*, L. 161

2. *Per Stawell*, C. J.—There is a marked distinction in Rule 9 of cap. ii. of the *Supreme Court Rules* between the word “trade” and the word “business,” and those who take on themselves the responsibility of making declarations, putting their own interpretation on the Rules, must, if they afterwards discover themselves wrong, take the consequences of so acting. *Ibid.*

3. *H. S.* was during part of the three years next preceding his application to be admitted to the bar, the proprietor, printer, and publisher of a newspaper, and collected the debts of the paper, and printed for gain, matters not essential to the owning, printing, and publishing of the newspaper; he was also on the list of the members of the Melbourne Stock and Share Exchange. Before admission to the bar he swore the necessary affidavit that he was not during the three years engaged in any “trade or business.” On motion to disbar or suspend him on the grounds (1) that he had followed a trade or business, and (2) that being disqualified thereby, he obtained admission by improper means, *Held*, that he had followed a trade or business, and was disqualified as to the portion of the three years during which he did so; that the Court was not satisfied he had obtained admission with knowledge of his disqualification; and that the case was met by suspending him from practising at the bar for twelve months. *In re Spensley*, L. 173

BILL OF EXCHANGE.

Fraudulent alteration after acceptance: negligence and liability of acceptor.

A bill drawn on *E.* for £60 on a

printed form was handed to him for acceptance. *E.*'s sight was weak, and he supposed the sum of £60 was properly written in writing and in figures on the bill. He accepted as for £60. After *E.*'s acceptance the drawer, or some person with his consent, inserted before the word “sixty” the words “one hundred and,” and before the figures “60” the figure “1,” thus changing the bill to one for £160. This fraud was rendered perfectly easy by the manner in which the words and figures of the amount originally written were filled in. The bill, as fraudulently altered, was endorsed and delivered to the *Bank of A.*, who had no notice of the fraud. In an action by the bank on the altered bill for £160, there was a verdict for the Plaintiff. On rule *nisi*, obtained by the Defendant, to set aside the verdict, *Held*, that *E.*, by his negligent conduct, must be deemed to have made the drawer his agent to alter the bill; and that the verdict must stand. *Bank of Australasia v. Erwin*, L. 70

BILL OF SALE.

See REGISTRATION I.

A. borrowed from *B.* £200 for three months, at interest, at 10 per cent. per annum, and executed a bill of sale of all his furniture to *B.*, conditioned to be void on payment on demand of £200 and interest at 10 per cent. per annum. On the same day *A.* gave to *B.* his, *A.*'s, acceptance at three months for £205. During the currency of the acceptance *B.* demanded payment of the £200, and interest to the time of such demand; and, on non-payment, seized the furniture under the bill of sale, and advertised its sale. *A.* then tendered to *B.* £200 and

interest, conditionally on the bill of sale and acceptance being given up, which was refused. *A.* then filed his bill against *B.* for an injunction to restrain the sale, and for rectification of the bill of sale, and obtained an *ex parte* injunction. On motion to dissolve the injunction, *Held*, that the Defendant should not be allowed to take the acceptance and use it as his own, and at the same time enforce immediate payment under the bill of sale; that although the Plaintiff did not make a strictly legal tender, there had been a substantial, proper, and adequate offer of payment, and one sufficient to induce the Court to interfere by injunction and restrain the sale. *Murphy v. Martin*, E. 26

BOND.

Administration.

See PRACTICE (ECCLESIASTICAL)
III.

BROKER (PASSAGE).

See LICENSE II.

BUSINESS.

See BARRISTER.

CALLS.

See DEED.

CARRIER.

See LICENSE I.

CAVEAT.

I. *Against application for administration.*

See PRACTICE (ECCLESIASTICAL), II.

II. *Under No. 140, sec. 80.*

A caveat lodged under the 80th sec. of the "*Real Property Act*," No. 140, claiming a lien on land for a sum specified, and forbidding the registration of any instrument affecting the land until after notice to the caveator, will not be extended to include a claim to the land absolutely, alleged by affidavit; and the person applying to be registered as proprietor may on summons to the caveator obtain an order from a Judge in Chambers for withdrawal of his caveat, upon payment to him of the sum therein specified. *In re The Real Property Act, Ex parte Lyons*, L. 120

CERTIFICATE.

I. *Of Discharge of Insolvent.*

See PRACTICE (INSOLVENCY) III.

II. *Of Marriage.*

See EVIDENCE I.

III. *Of Title.*

The Registrar-General is not bound to issue a certificate of title to a purchaser from a Crown grantee, until the purchaser signs a receipt for the duplicate Crown grant. *Fitzgerald v. Archer*, L. 40

CERTIFICATE, REFUSAL OF.

I. *Appeal from Commissioner: Jurisdiction.*

The Court has no jurisdiction, other than that conferred by Statute, to entertain an appeal from the refusal of an Insolvent's certificate. *In re Bateman*, I. E. & M. 85

II. *False answers and explanations.*

An objection to the grant of a certificate to an insolvent charged

x CERTIFICATE, REFUSAL OF. CERTIFICATE, REFUSAL OF.

him with having knowingly and wilfully given false answers and false explanations when under examination on oath. *Held*, that the offence under the Act related to answers by the Insolvent to inquiries made for the discovery of assets, &c., and not to answers to protect himself from the refusal of a certificate; and objection overruled. *In re Thomas*,

I. E. & M. 40

III. *Generally.*

As to the conduct for which a certificate should be withheld, the Court is not limited to the enumeration in the Act 7 *Vic.*, No. 19.

Ibid.

IV. *Insolvent departing the colony.*

It is ground for the refusal of a certificate of discharge to an Insolvent, that after the sequestration, and without leave of the creditors or the Court, he left the colony, and had not returned when the application for certificate was made. *In re Hewitt*,

I. E. & M. 38

V. *Voluntary settlement.*

J. S. was executrix of *P. S.*, her husband. In July, 1861, *B.* instituted a suit against *J. S.* as executrix to establish a sub-partnership between himself and *P. S.* On 20th January, 1863, pending the suit, *J. S.* settled all her property on one of her daughters upon the occasion of her marriage. On the 7th October, 1863, a decree was obtained by *B.* declaring him entitled as a sub-partner with *P. S.*, and directing accounts of the sub-partnership. On the 25th November, 1863, *J. S.* voluntarily sequestered her estate. On appeal from the decision of the Chief Commissioner, granting the Insolvent her certificate, *Held*, by the primary

Judge, and on appeal by the full Court, that *J. S.* was indebted to *B.* at the date of the settlement, though the proof of it had not then been established; that looking at all the circumstances of the case the settlement was not a *bond fide* one, but colorable only, and the consideration of marriage could not support such a settlement; and certificate refused on the ground that the Insolvent being indebted had unjustifiably disposed of property otherwise than *bond fide* and for valuable consideration. *In re Solomon*,

I. E. & M. 45

CERTIORARI.

Where it will not lie.

See ACTION V.

CHARTER PARTY.

See CONTRACT IV.

CHIEF COMMISSIONER OF
INSOLVENT ESTATES.

See PRACTICE (INSOLVENCY) V.

CHILDREN.

Custody and maintenance of.

See PRACTICE (DIVORCE, &c.) IV.

CIRCUIT DISTRICT.

See SEQUESTRATION I. 1.

CITATION.

Service of.

See PRACTICE (DIVORCE, &c.) II.

CLAIM, MINING.

See EJECTMENT II.

CODICIL.

See WILL, 1, 2.

COLLUSION.

See PRACTICE (INSOLVENCY) VI. 2.
SEQUESTRATION III. 1.

COMMISSIONER.

See PRACTICE (EQUITY) V.

COMMON.

See LICENSE III.

COMMON CARRIER.

See LICENSE I.

COMPANY.

Miner's right for.

A gold-mining company, registered under the "*Companies Act 1864*," is entitled to a miner's right, whatever may be the requirements of the law as to each individual miner in such company holding also personally a miner's right as heretofore. *In re Verdon and Berry; Ex parte The Albion Company*,
L. 207

CONDONATION.

See MISCONDUCT CONDUCTING TO
ADULTERY.
PRACTICE (DIVORCE, &C.) V.

CONFIRMATION.

See PRACTICE (INSOLVENCY) II. 2.

CONNIVANCE.

See PRACTICE (DIVORCE, &C.) V.

Where, on a petition by the husband for divorce on the ground of the wife's adultery, the evidence did not shew that the petitioner desired, intended, contemplated, or winked at his wife's offence, *Held*, that a charge of connivance was not established. *Terry v. Terry*,
I. E. & M. 78

CONSIDERATION. xi

I. *For conveyance within 60 days of sequestration.*

See PREFERRING CREDITOR.

II. *Of marriage.*

See CERTIFICATE, REFUSAL OF, V.

CONSTRUCTION.

See CONTRACT, IV.

COTEMPORANEOUS DOCUMENTS.

DEED I.

EXONERATION OF MORTGAGED
LANDS.

WILL, 3.

CONTRACT.

I. *Sale and delivery: non-acceptance: proof of identity of goods.*

H. & O., of Ballarat, ordered of *W., W., & Co.* in Melbourne, iron pipes to be delivered by the railway at Ballarat. *W., W., & Co.* forwarded pipes by train, but *H. & O.*, deeming them not according to the weight, left the pipes lying at the station to the order of *W., W., & Co.* The correspondence did not, either expressly or by reference, identify any particular pipes. In an action for goods sold and delivered, and goods bargained and sold, *W., W., & Co.* recovered the price of the pipes. On rule for a nonsuit, *Held*, that there had been no acceptance to complete a sale and delivery; that extrinsic evidence to identify any particular pipes as those bargained and sold under the correspondence could not be given; and that as the correspondence alone did not identify any particular pipes it did not constitute a memorandum in writing of the contract sufficient within the Statute of Frauds. *Wilkie v. Hunt*,
L. 66

II. *Guaranty : scope of policy against losses by wilful neglect.*

Where it was the duty of a branch bank manager to inspect weekly the accounts of the clerks under him, and he neglected the inspections; and in consequence of such neglect the embezzlements of a clerk, extending through the whole year, were undiscovered, and the bank sustained loss thereby: *Held*, that the damage was covered by a guarantee policy against losses "by reason or in consequence of the wilful default or culpable neglect" of the manager "in or arising out of his employment" in the bank. *Colonial Bank of Australasia v. The European Insurance and Guarantee Society*, L. 15

III. *On a double event : implied warranty.*

Declaration that *Cohen* and another and *Cleve* and another agreed that the *Cleves* should deliver and the *Cohens* accept and pay for forty-five half-tierces of *Barrett's* anchor-brand twist tobacco, *ex* a certain ship called the "*Roxburgh Castle*," to arrive, at the price of 5s. per pound in bond all round, and on other terms specified in the contract; breach alleged that though the "*Roxburgh Castle*" arrived after the agreement without forty-five half-tierces of *Barrett's* anchor-brand twist tobacco, but with forty-five half-tierces of a less valuable kind of tobacco, yet the *Cleves*, after such arrival and before suit, delivered to the *Cohens* forty-five half-tierces of tobacco, *ex* the said ship, of a less valuable kind as and for the said forty-five half-tierces of *Barrett's* anchor-brand twist tobacco, *ex* the said ship, so agreed to be delivered. And the *Cohens*

not knowing, &c., and believing, &c., and that the *Cleves* were delivering, &c., under and in pursuance of the said agreement, received the said tobacco, and paid for the same at the rate, &c., according to the agreement. And the *Cleves* have not delivered to the *Cohens* forty-five half-tierces of *Barrett's* anchor-brand twist tobacco, *ex* "*Roxburgh Castle*." On demurrer to the breach, *Held*, that the original contract was on a double event—the arrival of the "*Roxburgh Castle*" and her arrival with goods of the sort named; that the original contract was gone when the ship arrived without goods of the sort named; that on the subsequent facts of mere delivery and acceptance and payment, no implied warranty was imported; and that in the absence of such warranty, and of all fraud, the declaration was bad, and the Plaintiffs without remedy. *Cohen v. Cleve*, L. 167

IV. *Construction of Charter-party : demurrage while waiting for berth at wharf.*

A ship-owner, who has by charter-party contracted to bring his ship "to Hobson's Bay, or as near thereto as the ship may safely get," and to deliver cargo "at any wharf where the ship can safely lie afloat," and who has brought his ship into the bay convenient to a wharf named by the charterer, may claim demurrage for any days during which he was ready to come alongside the wharf and discharge, but was kept waiting for a berth; and for any days during which, under stress of weather, he hauled out from the wharf to a distance, whence he could come alongside again as soon

CONTRACT.

as the weather permitted. *Young v. Woolley*, L. 30

V. *For sale of Crown lands.*

See SPECIFIC PERFORMANCE.

CONTRIBUTORIES.

List of

See WINDING-UP ACT.

CONVEYANCE (VOLUNTARY).

See FRAUDULENT PREFERENCE.

CONVEYANCING.

Illegal.

See PENALTIES II.

CONVICTION.

See PRACTICE AT LAW II.

CORPORATION.

1. Where a street is not already levelled and paved, it is not obligatory upon a Municipal Council to fix its level under the Act No. 184, sec. 281, before altering its existing level. *Lavezzello v. Mayor of Daylesford*, E. 113.

2. A Municipal Corporation established under the "*Municipal Corporations Act 1863*" does not represent the interests of the population of the municipality, so as to be entitled to maintain a suit to abate a nuisance existing in the municipality, but not shewn to be upon soil the property of the corporation. Such a corporation has no right to institute, on behalf of the public or any private individual, proceedings to restrain the continuance of such a nuisance. *Mayor of Ballarat v. Smith*, E. 52.

CORPORATION. xiii

Liability of: for consequences of negligent care of streets.

See ACTION, 1, 2.

COSTS.

See ARBITRATION AND AWARD II.
PRACTICE AT LAW II.
PRACTICE (DIVORCE, &c.) III.
PRACTICE (EQUITY) IV., VI., VII., XIV.
PROHIBITION II.

COTEMPORANEOUS DOCUMENTS.

Courts of Equity so regard documents given contemporaneously and in one transaction, that if one of them fixes a date and thereby gives a right to a time for payment which the others do not give, the Court will give to the whole that meaning as to time which is given by the one document only. *Murphy v. Martin*, E. 26.

COUNSEL.

See BARRISTER.

Duty of to correct mistake of Judge.

See MISDIRECTION.

COUNTY COURT.

See APPEAL I.

COURT OF MINES.

Jurisdiction of.

See JURISDICTION IV.
REHEARING.

CREDITOR.

Petitioning.

See SEQUESTRATION II. 1, III. 2, 3.

CREDITORS' DEED.

See TRUSTEE, 2.

I. *Reservation by proviso and subsequent proclamation.*

A Crown grant to a railway company was made "subject to the trusts, conditions, uses, and provisions hereinafter contained." One of the provisions thereafter contained was as follows:—"Provided nevertheless and We do hereby reserve unto Us, Our heirs, &c., all mines of coal and such parts or so much of the said land as may hereafter be required for making public ways, canals, railroads, sewers or drains in over and through the same to be set out by Our Governor for the time being of Our said colony of Victoria, or some person by him authorised in that respect." The Governor by proclamation set out a public right-of-way across the railway. The company arrested a person for using the right-of-way. The person arrested brought trespass against the company, setting up the right-of-way by his replication, and he obtained a verdict. On rule *nisi* for nonsuit, *Held*, that the reservation was good, and the verdict right. *Jenkyns v. Elsdon*,

L. 145

II. *Duplicate.*

See CERTIFICATE III.

CROWN LANDS.

See AGENT.

LICENSE III.

SPECIFIC PERFORMANCE.

CROWN REVENUES.

Function of Supreme Court in matters of revenue.

Semble, per Barry, J.—It is the duty of the Supreme Court, which acts as the Exchequer Court of England does in matters of revenue,

CROWN REVENUES.

to protect the revenues of the Crown in this colony. *Fitzgerald v. Archer*,
L. 40

CULPABLE NEGLIGENCE.

See ACTION II.

BILL OF EXCHANGE.

CONTRACT II.

DAMAGES.

Consequential.

See JURISDICTION II. 1.

DAY TO SHEW CAUSE.

See PRACTICE (EQUITY) X.

DEATH.

After seven years' absence.

See PRESUMPTION I.

DEBT.

I. *Fraudulently contracting.*

See FRAUDULENT INSOLVENCY.

II. *Petitioning Creditor's.*See PRACTICE (INSOLVENCY) I. 1,
IV. 1.

SEQUESTRATION III. 2, 3.

III. *Proof of.*

See PRACTICE (INSOLVENCY) I. 1, VI.

DECLARATIONS.

Statutory.

See PRACTICE (ECCLESIASTICAL) I. 3.

DEED.

I. *Construction of: time for payment of calls.*

An action was brought in the

Supreme Court of Victoria for calls from a shareholder of a company at Newcastle, in New South Wales. The deed of settlement provided that calls should be made "at such times and places as the said directors may determine, by one or more advertisement or advertisements in one or more of the daily newspapers published at Sydney and at Melbourne respectively." The calls were made by one advertisement in the *Sydney Morning Herald* and the *Melbourne Argus*, and the advertisements in those papers fixed one day for payment of the calls at Sydney, and another for payment of the calls at Melbourne. On demurrer to a plea setting up as a defence that "no time" was fixed, because two different times had been fixed; and that different times could not be fixed for Sydney and Melbourne, *Held*, that the advertisements had been given in compliance with the deed; and judgment given for Plaintiff. *Melbourne and Newcastle Minmi Colliery Coy. (Limited) v. Hodgson*, L. 205

II. *Execution by members of company evidence of membership before date of execution.*

See POLICY.

III. *Of partnership.*

E., M., & L., partners as contractors for making a particular railway, provided by their deed of partnership, dated December 24, 1858, that *L.* should receive from the partnership £100 per month for the use of the railway-plant, &c., belonging to him, and brought upon, and then employed in making the railway, and after the completion of the railway such plant, &c., should revert to and continue the sole and

absolute property of *L.* In this partnership *L.* was, in fact, a trustee for *N. & R. G. & Co.* After this deed, fresh plant was bought and intermixed with the old, and both the old and fresh plant repaired. By a deed of 21st March, 1860, the partnership between *E., M., & L.* was dissolved, and a fresh partnership entered into between *L.* and *W.*, and it was *inter alia* provided that the plant, &c., then upon the railway, should be valued, the plant be assigned to *W.*, and the amount of valuation be paid to the trustees of *N. & R. G. & Co.*'s estate; and by the same deed *E. & M.* assigned to *W.* their shares in the contract; and *L.*, with consent of *N. & R. G. & Co.*, and the trustees of their estate, assigned to *W.* the plant, &c., then being upon the railway. In taking an account of the net profits of the contract, the Master excluded from the disbursements on account of the contract, the sum of £76,857 12s. 1d., paid for the purchase and repair of plant up to the 21st March, 1860, and charged the contract only with a rental for plant of £100 per month, amounting to £1,500. On exceptions to his report. *Held*, that in ascertaining the profits of the contract, neither the Master nor the Court should depart from the rights defined by deed, or receive any parol evidence to vary them. That under the deed of December, 1858, *L.* was under no obligation to supply additional plant, but that the deed of March, 1860, treating the plant, &c., at that date as the property of *L.*, and not of *E., M., & L.*, was conclusive upon the parties; that all expenses of repairing plant, prior to 24th December, 1858, and incurred with his approbation subsequently to that date, should be borne by *L.*; and

exceptions overruled. *Evans v. Guthridge*, E. 119

DELAY.

See PRACTICE (INSOLVENCY) V.

DELIVERY.

See CONTRACT I.

DEMURRAGE.

See CONTRACT IV.

DEMURRER.

See PRACTICE (EQUITY) VII.

DEPOSITIONS.

Admissible, of absent woman, enceinte but not otherwise ill.

The words in the 11 and 12 *Vic.*, cap. xlii. sec. 17, "or so ill as not to be able to travel," include the case of a woman sworn by her husband to be suffering from no other disease than her approaching confinement, but to be not in a fit state to travel, on account solely of such approaching confinement; and a conviction supported by the depositions of such an absent woman was affirmed by the Court. *Regina v. Ah Pock*,

L. 127

DETERMINATION.

What is a: by magistrates under No. 159, sec. 11.

See EVIDENCE III.

DISCLAIMER.

See TRUSTEE ACT 1856.

DISCRETION.

See ACTION I.

PRACTICE (ECCLESIASTICAL)

II. 2.

TRUSTEE, 2.

WINDING-UP ACT, 3.

I. *For water-rates without supply.*

Under the Act No. 59, sec. 5, the Board of Land and Works caused a water-pipe and stop-cocks to be laid so as to convey a supply of water within a messuage belonging to *F.* On the 12th February, 1864, *F.* gave notice to the Board that it was his intention to discontinue the use of water supplied to his messuage after that date, and paid the rates up to the 30th June, 1864. Before the 30th June, 1864, *F.* removed the pipe and stop-cocks, so that a supply of water could no longer be conveyed within the messuage unless a proper pipe and cocks were again laid. *F.* used no more water, but the Board were always ready and willing to supply him. *F.* refusing to pay water-rates after June, the Board distrained; and an action was commenced, and this case stated without pleadings, the question for the Court being whether the distress was legal: *Held*, that the laying down of a service-pipe and stop-cocks to each occupation was equivalent under the Act No. 59 to an actual supply of water; that payment was compulsory after such supply whether the water were used or not; and that the distress was legal. *Fellows v. Board of Land and Works*, L. 199.

II. *Without warrant by landlord to bailiff.*

In replevin by *H.* against *B.*, the latter under his avowry as agent of the landlord, proved a warrant by himself to the bailiff, but did not prove any warrant by the landlord to himself. After verdict for Defendant on a rule *nisi* to enter a verdict for Plaintiff, *Held*, that notwithstanding the ne-

DISTRESS.

gative form of the words of the "*Distress Act*," 15 *Vic.*, No. 4, sec. 1, the seizure was valid, and the avowry and the verdict good. *Harker v. Barwick*, L. 165.

DISTRESS (EXCESSIVE).

Action for.

See ACTION V.

DISTRICT SURVEYOR.

See AGENT.

DIVIDEND.

Payment of.

See TRUSTEE 2.

DIVORCE.

See ALIMONY.

CONNIVANCE.

MISCONDUCT CONDUCTING
TO ADULTERY.

PRACTICE (DIVORCE, &c.)

DOUBLE EVENT.

See CONTRACT III.

DRAINAGE ASSESSMENT.

See APPEAL II. 1.

EASEMENT.

Reservation of.

See CROWN GRANT.

EJECTMENT.

I. *Various proofs of seisin and title consistent and admissible.*

In ejectment by *T.* and *H.* against *P.* and another the Plaintiffs proved a Crown grant to *C. W.*, but no *W. W. & A. B.* VOL. I.—INDEX.

EJECTMENT.

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devolution of any estate from *C. W.* to the Plaintiffs; acts of seisin of the Plaintiff *T.*, and assurances from the Plaintiff *T.* to the Plaintiff *H.* On rule *nisi* for nonsuit, *Held*, that inconsistency, not multiplicity, forms the test by which a Plaintiff's several modes of proof may or may not be deemed admissible; that the grant to *W.* was not inconsistent with the presumption of seisin arising from the evidence of *T.*'s possession; and that the rule *nisi* for a nonsuit must be discharged. *Thurlow v. Perks*, L. 142.

II. *For a "claim:" miner's right: estate at will.*

The interest of the holder of a "miner's right" in his "claim" is at the utmost an estate at will, and for such an estate an action of ejectment cannot be maintained. *Jennings v. Kinsella*, L. 47.

III. *By the Crown.*

See LICENSE III.

ENACTMENT.

By reference.

See PENALTY II.

ESTATE.

At will.

See EJECTMENT II.

ESTOPPEL.

See APPEAL IV. 1.

DEED III.

SEQUESTRATION III. 4.

EVIDENCE.

I. *Certificate of marriage: duplicate original: No. 70, sec. 17.*

Where under the Act 16 *Vic.* No.

26, sec. 20, only one original registration form of a marriage had been filled up instead of duplicate originals, and only a copy of the original was registered instead of a duplicate original: *Held*, that under the Act No. 70, sec. 17, the irregularly registered copy of the original, and a copy of that copy, were sufficient proof of the marriage. *Crowl v. Flynn*, L. 62.

II. *Rate books only prima facie evidence under No. 176, sec. 206: costs.*

The T. Road Board sued L. in Petty Sessions for rates, and offered the rate books as conclusive evidence that the rate was a valid one. L. offered evidence to shew that the rate was invalid. The magistrates held, under No. 176, sec. 206, that the rate-book was conclusive evidence. *Held*, that the magistrates were wrong, and their decision reversed; but no costs given against the Road Board as a public body. *Lindsay v. The Tullaroop District Road Board*, L. 61.

III. *Wrong rejection of by magistrates: determination within No. 159, sec. 11.*

C. and T. entered a licensed hotel in Melbourne to drink. P., the landlord, ordered the barmaid not to serve C., and he was not served. T. asked if he could be served, and was answered "Yes." C. poured out wine for himself, put down a shilling, and was about to drink, when P., the landlord, assaulted him violently, and ejected him from the bar. C. summoned P. before Justices for the assault. At the hearing, P.'s counsel offered, in mitigation of damages, evidence that C. had seduced P.'s wife. The

Justices rejected the evidence, and awarded C. £5 as damages, with £1 3s. 6d. costs. On appeal, when it was conceded for Respondent that the evidence was improperly rejected, *Held*, that the decision of the Justices in rejecting evidence which, if admitted, might have left the ultimate decision of the case the same, was not such a "determination" of the matter before the Justices as was contemplated by the Act No. 159, sec. 11, giving the right of appeal; that there was therefore no appeal in the present case; and that the Court could not go into the appeal case at all. *Peachment v. Conlon*, L. 74.

IV. *Proof of proceeding before committing magistrates in New Zealand.*

Proceedings in New Zealand before magistrates sitting merely to commit for trial and not to hear and determine—acting ministerially and not judicially—are within the meaning of the "Evidence Act" No. 100, sec. 37, and may be proved in Victorian Courts by copies of them authenticated in the way pointed out by that Act. *Eastwood v. Bullock*, L. 92.

V.—*Of Complaint by prosecutrix on information for rape.*

See RAPE.

VI.—*Of Death.*

See PRESUMPTION I.

VII.—*Of Intent in forgery.*

See FORGERY.

VIII.—*Of Membership of joint-stock company.*

See POLICY.

EVIDENCE.

IX.—*Of Title in ejectment.*

See EJECTMENT I.

X. *Of Woman enciente but not otherwise ill.*

See DEPOSITIONS.

XI.—*Parol.*

See DEED III.
WILL I.

EXCEPTIONS.

See DEED III.

EXECUTION.

I. *Of Deed.*

Date of, and relation back to, earlier date of deed.

See POLICY.

II. *Of Will.*

See WILL, 1.

EXECUTOR.

See SEQUESTRATION II. 1, III. 4.

I. *According to the tenor.*

See PRACTICE (ECCLESIASTICAL) III.

II. *Appointment of.*

See PRACTICE (ECCLESIASTICAL),
V. 1.

WILL.

EXHIBITS.

See PRACTICE (EQUITY), VIII.

EXONERATION OF MORT- GAGED LANDS.

A testator, after appointing ex-
ecutors, devised to his wife a portion
of his real estate for her life, and
bequeathed to her all the ready

EXONERATION OF MORT- GAGED LANDS.

money of which he might die pos-
sessed, and directed her to pay his
funeral and testamentary expenses,
and also "all debts due at decease."
Held, that to the extent of the life-
estate, and ready-money given to
the wife, and to that extent only,
such direction was the signification
of an intention to exonerate lands
subject to equitable mortgages from
mortgage debts within the meaning
of the Act No. 61; that the estate
in remainder after the wife's death
was not chargeable with such debts;
and that "debts due at decease"
would include debts the time for
payment of which had not arrived
at the time of testator's death.
Press v. Hardy, E. 97

EXPIRED LAWS.

See PENALTY.

PLEURO-PNEUMONIA.

EXPUNGING PROOF OF DEBT.

See PRACTICE (INSOLVENCY), VI.

FALSE ANSWERS.

See CERTIFICATE, REFUSAL OF, II.

FALSE PRETENCE.

See FRAUDULENT INSOLVENCY.

FEME COVERT.

See HUSBAND AND WIFE.
SEPARATE ESTATE.

FOLIOS.

Non numbering of.

See PRACTICE (INSOLVENCY), I. 2.

See MORTGAGE, 2.
PRACTICE (EQUITY), X.

FORFEITURE.

See LANDLORD AND TENANT.

FORGERY.

See FRAUDULENT INSOLVENCY.

Evidence of intent.

H. went to a country inn near Melbourne, and in fourteen days ran up a bill of £13 7s. 6d. The landlord did not apply for payment. *H.* gave the landlord a forged cheque for £15 to get cashed in Melbourne. Next day, before the landlord started for Melbourne, *H.* asked for the cheque back, saying a friend was coming to the house who would give him some money. The landlord did not return the cheque, but took it to Melbourne, where it was dishonored. When the landlord got home again that day *H.* was gone. On being arrested ten miles off, he said, "I gave the cheque to him to quiet him (the landlord) till the mail comes in." By the English mail *H.* did receive £40. *H.* was convicted of forging and acquitted of uttering. On a case reserved, *Held*, that the conviction was right. *Regina v. Hooper*, L. 195

FRAUD.

See BILL OF EXCHANGE.

FRAUDULENT CONVEY- ANCE.

See CERTIFICATE, REFUSAL OF, V.
SETTLEMENT.

Conveyance set aside as fraudulent and void both at common law and under 13 *Eliz.*, cap. v. *Jacomb v. Donovan*, E. 66

Discounting a forgery comes within the letter of the 5 *Vic.*, No. 17, sec. 73, as "contracting a debt fraudulently by means of a false pretence," and is an act of fraudulent insolvency. *In re Thomas*, I. E. & M. 40

FRAUDULENT PREFERENCE.

See PREFERRING CREDITOR.

S., in 1860, borrowed of *W.*, his father-in-law, £1500, and gave *W.* a warrant of attorney and bond for the amount. Judgment was not entered up on the warrant of attorney, but a writ was issued, and judgment entered up in the action. In January, 1862, *W.*, by threats to put the Sheriff in possession and by other great pressure, got from *S.* some cash payments, and a transfer of two bills of exchange. Within sixty days of the payments and transfer, *S.* absconded, and his estate was sequestered. *C.*, his official assignee, sued *W.* for money had and received, and in trover, for the proceeds of the bills. It was admitted that the cash payments were valid under the Act 5 *Vic.*, No. 17, sec. 12, but contended that the transfer of the bills was absolutely void under sec. 8, although such transfer were involuntary, and there were no fraud in the preference of *W.* to other then existing creditors. The jury found for the Defendant; and found specifically that the transfer was made by the insolvent *bonâ fide*. On rule nisi to enter the verdict for the Plaintiff: *Held*, after judgment reserved till a full report of *The Bank of Australasia v. Harris*, before the Privy Council, had been received from England; that as the transfer of the bill was not voluntary it was not defeated by the 5th *Vic.*, No.

FRAUDULENT PREFERENCE.

17, sec. 8, and rule *nisi* to enter verdict for Plaintiff discharged.
Courtney v. Wilson, L. 110

GOLD-FIELDS' COMMON.

See LICENSE III.

GUARANTY.

See CONTRACT II.
POLICY.

GUARDIAN.

Ad litem.

See PRACTICE (EQUITY) IX.

HEIR.

See ACTION III., IV.

HUSBAND AND WIFE.

I. *Acquiescence of wife.*

Personal property was vested in trustees upon trust to invest and pay the annual income to a *feme covert*, for her separate use, with a restraint upon anticipation. By arrangement between the agent of the trustees, and the husband of the *c.q.t.*, who was a mortgagor of such agent, the annual income of the trust property was set-off against the interest payable by the husband to the agent; and no interest was demanded by, or paid to, the *c.q.t.* for six years. In a suit by the *c.q.t.* against the trustees, the evidence as to the express assent of the *c.q.t.* to the arrangement between her husband and the agent of the trustees being conflicting: *Held*, that whether she did or did not

HUSBAND AND WIFE. xxi

assent was immaterial, she being bound by her acquiescence in the virtual receipt of the interest by her husband. *Woodward v. Jennings*, E. 1

II. *Coercion of wife.*

See LARCENY.

ILLEGAL ASSOCIATION.

See ASSOCIATION.

IMMEDIATELY.

Evidence for jury, that statement of loss was made "immediately."

See POLICY.

IMPOUNDING.

See PROHIBITION III.

INDEMNITY.

E., *M.* & *L.*, partners in a contract, dissolved partnership, and *E.* and *M.* retired from the contract. By the deed dissolving the partnership, it was provided that *E.* and *M.* should each by *L.*'s bond be secured a sum equal to one-tenth of the profits of the contract throughout, and be indemnified against losses. *L.* was, in fact, only a trustee for others. Subsequently *L.* was removed as trustee, and *W.* appointed in his place, *L.*'s bonds being given up by *E.* and *M.* on their obtaining a covenant from *W.* to pay and do that which *L.* was bound by his bonds to pay and do. The contract being completed, *E.* and *M.* filed a bill against *W.* and his *cestuis que trustent* for an account and payment of a sum equal to one-tenth of the profits. *Held*, that *E.* and *M.* were

only entitled to a personal decree against *W.*, and not against the parties ultimately liable to indemnify him. *Evans v. Guthridge*, E. 119

INDULGENCE.

See PRACTICE (INSOLVENCY) V.

INFANT.

See JURISDICTION, II. 2.
PRACTICE (EQUITY), IX., X.

INJUNCTION.

I. *In Equity.*

See BILL OF SALE.
JURISDICTION, II. 1.
PRACTICE (EQUITY), XI.,
XIII. 1.

A. let land to *B.*, who sub-let part to *C.* *C.* entered into an agreement with *D.*, under which *D.* entered and committed waste. On a bill by *A.* against *B.* and *D.* only, to restrain waste, *Held*, that *C.* not being a party to the suit, no injunction could be granted as to the land sub-let to him. *Cruthers v. White*, E. 133

II. *In Court of Mines.*

1. In a mining suit in the Court of Mines the Plaintiffs obtained an injunction from the Deputy-Judge, outside of his territorial limits. The Plaintiffs then moved, before the Court of Mines, to vary the injunction; and the Defendants to dissolve it. The Court refused the motion to dissolve; and did not grant the motion to vary; but of its own motion made a fresh injunction substantially similar to that granted by the Deputy-Judge. On appeal from both decisions, *Held*, that the injunction granted by the Deputy-Judge should have been dissolved;

INJUNCTION.

and that the injunction granted by the Court was not warranted by the proceedings or materials before it; and both decisions reversed with costs. *James v. Higgins*, L. 51

2. *Semble*, per *Stawell*, C. J., that under the Act No. 82, sec. 70, the Court of Mines may grant an injunction without there being any suit pending. *Dennis v. Vivian*, L. 201

INSOLVENT.

Punishment under 7 Vic., No. 19, sec. 19.

An Insolvent filed his schedule suppressing the ownership of the greater portion of his property, and introducing a fictitious statement as to debts. Upon the messenger of the Court seeking to seize goods, the property of the Insolvent, he did not surrender them, but falsely represented them as the property of a woman with whom he was cohabiting. *Held*, that in so doing he perpetrated an offence within 7 *Vic.*, No. 19, sec. 18, and became liable to punishment under sec. 19. *In re Pogonowski*, I. E. & M. 29

INSURANCE.

See CONTRACT, II.
POLICY.

JUDGMENT DEBT.

See PRACTICE (INSOLVENCY), IV. 1, VI. 2.

JURISDICTION.

I. *At Law:*

1. *Enlargement of term: pending business.*

Where on the last day of term

the term had been enlarged for two days for the disposing of business pending at the end of the last day of term, the Court refused, on the ground of want of jurisdiction, to hear a motion not in the list of the business pending at the end of the last day of term. *In re Lyons*,

L. 19

2. *On Appeal from County Court.*

See APPEAL, I.

3. *In matters of revenue.*

See CROWN REVENUE.

II. *In Equity.*

1. Consequential damages do not constitute a case for the interference of a Court of Equity. A bill is not sustainable for an injunction to restrain an official assignee from selling goods seized, he alleging them to be the property of the insolvent. *Fisher v. Jacomb*,

E. 91

2. In a suit by an equitable mortgagee of real estate devised to infants, praying a sale in satisfaction of his charge, the Court has no jurisdiction under 11 Geo. IV. and 1 Wil. 4, cap. xlvi, to direct that the amount charged shall be raised by mortgage instead of by sale. *Walker v. Hogan*,

E. 88

III.—*In Insolvency.*

See CERTIFICATE, REFUSAL OF, I.
PRACTICE (INSOLVENCY) V.

The sittings of the Appellate Court do not oust the primary Judge of jurisdiction during such sittings. *In re McManomomie*,

I. E. & M. 53

IV. *Of Court of Mines.*

See INJUNCTION II.

1. The Judge of a Court of Mines has no jurisdiction to hear and

decide, out of the territorial limits of his Court, a motion to grant an injunction in a matter otherwise within the jurisdiction of the Court.

James v. Higgins, L. 51.

2. The Court of Mines has jurisdiction over a suit concerning a quartz-crushing partnership, if such partnership were limited within a gold-field. *Harvey v. Rodda*, L. 21

V. *Of Justices.*

1. Under the "*Melbourne and Hobson's Bay Railway Company's Act*," 16 Vic., sec. 63, authorising any officer or agent of the company to seize and detain an offender until he can be conveniently taken before "some Justice of the Peace in the district or place wherein such offence shall be committed," it is sufficient if the offender be taken before a Justice of the Peace having jurisdiction in and for the district or place in which the offence has been committed, and it is not essential that the nearest magistrate should adjudicate. *Jenkyns v. Eldon*,

L. 145

2. The 11 and 12 Vic., cap. xliii., sec. 11, does not merely restrict the Plaintiff's right of procedure, but also limits and defines the jurisdiction of the magistrates; and if facts displacing their jurisdiction under that enactment appear on the Plaintiff's proceedings, it is not necessary to plead such facts as a special defence under the Act No. 29, and the rules promulgated under it. *In re Prince, and Vaughan & Wild, Ex parte Binge*,

L. 12

JUSTICES.

Jurisdiction of.

See JURISDICTION, V.

See DISTRESS II.
INJUNCTION I.

A lessor in possession of the demised premises under a forfeiture for non-payment of rent, is liable to account for the rents and profits with wilful default. *McEwan v. Clarke*,
E. 85

LANDS DESCENDED.

See ACTION III., IV.

LAPSE.

See PRACTICE (INSOLVENCY) IV. 2.

LARCENY.

I. *By husband and wife : coercion of wife.*

Where a wife and husband acted in concert for a theft, the wife taking and the husband receiving, and on their trial the wife was acquitted of the stealing, because of the presumption that she had acted under her husband's coercion, but yet the husband was convicted of the receiving from his wife: *Held*, on a question reserved, that there was a stealing by the wife in fact, and that the presumption of law by which she was not here amenable to punishment did not alter that fact. Conviction affirmed. *Regina v. Bailey*,
L. 20

II. *Stealing by agency of a wife.*

Semble, that where a wife steals goods at the instigation of her husband, he is himself guilty of stealing. *Ibid.*

LEAVE TO PROCEED WITH
SUIT.

See WINDING-UP ACT, 2.

I. *Carrier's license under Act No. 178.*

R. sued *M.* for the value of work and labor done, in the carriage and delivery of goods. *M.* pleaded that the work and labor was done by Plaintiff "as a carrier by land for hire, within the colony of Victoria;" and that Plaintiff was not licensed "to carry on business as a carrier" under the Act No. 178. *R.* replied that the work was done under a special contract. On demurrer to the replication: *Held*, that the Act No. 178 requires carriers generally to take out licenses, and is not limited to the class known to the common law as "common carriers;" and that though a "common carrier," who enters into a special contract for the carriage of goods, ceases to be a common carrier *quoad* such contract; yet a carrier, within the meaning of the Act No. 178, may enter into a special contract for carriage, and still continue a carrier *quoad* the subject matter of that contract; therefore, judgment for the Defendant. *Renwick v. McCulloch*,
L. 49

II. *Passage Brokers'.*

The "Passage Brokers' Act 1863," No. 174, does not contemplate that owners of ships, and their managers, should be licensed as brokers. *S.*, the manager of the office in Melbourne of the *P. & O. Steam Navigation Company*, not being duly licensed to act as a passage broker, let a passage by a ship of the company from Melbourne to Ceylon, and was convicted therefor. On appeal, *Held*, that he was not liable to the penalty; and conviction reversed. *Sparkes v. Macfarlane*,
L. 90

III. *Pastoral.*

The pastoral run, called Lamplough Run, was long before, and in the year 1861, occupied by *D.* under a license from the Crown. By proclamation, dated 28th January, 1861, a part of Lamplough Run was proclaimed a gold-fields' common. No reduction of *D.*'s assessment or license-fee was made. By proclamation, dated 26th October, 1863, the gold-fields' common was abolished, and a new gold-fields' common proclaimed, which consisted of the middle third part only of the original gold-fields' common. *D.*, the former pastoral licensee, claimed the other two-third parts of the gold-fields' common, which were no longer part of any gold-fields' common. The Crown claimed the same lands as reverting to it freed from the rights both of the licensee (*D.*) and the commoners. The Crown put up the pasturage of the disputed lands to auction as "new runs," and it was purchased by *B.* and *N.* But *D.* had remained in possession alone, or with the commoners, and had paid his license-fee up to the end of 1863, and he impounded the stock of *B.* and *N.* The Crown brought ejectment against *D.* and obtained a verdict. On motion to enter a nonsuit, *Held*, that under No. 117, sec. 71, on the proclamation of a gold-fields' common over land occupied by a pastoral tenant of the Crown, the rights of the tenant and commoners might co-exist; that under No. 117, secs. 80, 107, and 121, yearly licenses might be issued as theretofore, might be revoked for any of the objects specified in the 80th section, and until so revoked would continue until the end of the year 1870; that the Crown had no right to treat these

disputed lands as unoccupied runs to be dealt with under section 98, as such a dealing with them was not for one of the specified objects; and that as the license of *D.* could not have been and had not been revoked, the Crown must fail in this ejectment. Rule for nonsuit therefore made absolute. *Regina v. Dallimore.* L. 153

LIEN.

See CAVEAT II.

LIMITATION OF ACTION.

Before Justices.

See JUSTICES.

MAGISTERIAL PROCEEDINGS.

Proof of.

See EVIDENCE IV.

MARRIAGE.

I. *Certificate of.*

See EVIDENCE I.

II. *Consideration of.*

See CERTIFICATE, REFUSAL OF, V.

MINE.

See RATE.

MINER'S RIGHT.

See COMPANY.

EJECTMENT II.

MINING.

Under public streets.

See ACTION II.

xxvi MISCONDUCT CONDUCT-
ING TO ADULTERY.

1. On a petition by the husband for divorce, it appeared in evidence that there had been a series of three distinct acts of adultery by the wife, each successively condoned by the husband without reference to any act of penitence on the part of the wife; that being fully alive to the wife's tendency, the husband, when she left his house, took no steps to ascertain where she had gone, or what she was doing; and that the act of adultery on which the petition was based was committed during such absence. *Held*, that the Petitioner had been guilty of misconduct conducing to the adultery. *Terry v. Terry*, 1. E. & M. 78

2. With reference to a charge of having, by his conduct, conduced to his wife's offence, it is right that the whole conduct of the Petitioner, in reference to his marital duties, from the contract of marriage to the commencement of the suit, should be considered. *Ibid*.

MISDIRECTION.

Mistake not misdirection: duty of counsel to correct mistake of Judge at trial.

At the trial of an action of trover for bags of salt, and also for certain empty salt bags, the Judge addressed counsel for Plaintiff, saying—"I suppose the count in trover is for the [empty] bags [only]." Counsel made no answer; but the Judge, by misapprehension, thought he was answered in the affirmative. The Judge then, assuming it to be correct that the count only covered the empty bags, directed the jury that as there was no evidence of conversion as to those bags, they must find for the Defendant. This was incorrect, for the count covered also the bags of salt claimed, as

MISDIRECTION.

well as the empty salt bags. But the error was not corrected, and the jury found for the Defendant. *Held*, that such mistake, and the direction founded on it, were not a misdirection in law; that it was the right and duty of counsel to interfere and correct such mistake; and that as counsel had not done so at the trial, when the mistake could have been readily corrected, a rule *nisi* for a new trial, on the ground of misdirection, granted to have the matter discussed and settled, should be discharged with costs. *Halfey v. Cole*, L. 37

MISTAKE.

See MISDIRECTION.

At an auction sale of land *B.* purchased lot 139, and *P.* lot 140. The clerk erroneously entered *P.* as the purchaser of lot 139, and *B.* as the purchaser of lot 140, and conveyances were executed by the vendor accordingly. *B.* entered into possession of lot 139, and *P.* of lot 140; and each subsequently sold the lot of which he was in possession, but conveyed the lot of which the other was in possession, and such conveyances were duly registered. On a bill by the vendees of *B.* against the vendees of *P.*, to which neither *B.* nor *P.* were parties, for rectification of the conveyances and to restrain an ejectment brought by the vendees of *P.* against the vendees of *B.* *Held*, that the bill was maintainable notwithstanding the apparent want of privity between the litigating parties; that the case should be dealt with simply on the ground of mistake; and that the Plaintiffs were entitled to a conveyance of lot 139, upon shewing their title to, and conveying lot 140 to the Defendants. *Sutherland v. Peel*, E. 18

MONEY HAD AND RECEIVED.

Where will not lie.

See ACTION V.

MORTGAGE.

See JURISDICTION II. 2.
PRACTICE (EQUITY) X.
REGISTRATION I.
SEPARATE ESTATE.

1. Plaintiff was legal and equitable mortgagee respectively of different portions of real estate of a deceased intestate, and as such instituted a creditor's suit against the intestate's personal representative and infant co-heiresses. Decree made for an account of the mortgage debts respectively, interest and costs; on non-payment within three months, for a sale of the equitably mortgaged premises; infant Defendants declared trustees for the purchaser, under the decree; and Plaintiff directed to convey the equitably mortgaged lands to such purchaser, for the interest of the infants therein; the Plaintiff within the term assigned to sell under the power of sale in the legal mortgage; and in case proceeds of all these sales insufficient to pay Plaintiff's principal, interest, and costs, then general accounts directed of the intestate's real and personal estate. *Collyer v. Corcoran*, E. 16

2. The proper remedy in equity, of an equitable mortgagee, is a sale and not foreclosure. *Bank of Victoria v. Cozens*, E. 93

MUNICIPAL COUNCIL.

See CORPORATION.

NEGLECT.

See CONTRACT II.
PRACTICE (DIVORCE, &c.) V.

NEGLIGENCE. xxvii

See ACTION I., II.
BILL OF EXCHANGE.

NEW TRIAL.

See MISDIRECTION.

NOTICE.

See PLEADING IN EQUITY.

I. *Of appeal.*

See APPEAL IV. 1, 2, 3.

II. *Of application for certificate.*

See PRACTICE (INSOLVENCY) III. 2.

III. *Of motion.*

See PRACTICE (EQUITY) XIII.
PRACTICE (INSOLVENCY) II. 1.
SEQUESTRATION III. 5.

IV. *Of Objections.*

See PRACTICE (INSOLVENCY) VII. 2.

NUISANCE.

See CORPORATION, 2.

OFFENDER, TRANSIENT.

See ARREST.
JURISDICTION V. 1.

OFFICIAL ASSIGNEE.

See JURISDICTION II. 1.

Costs of.

See PRACTICE (EQUITY) VI. 1, 2.

PAROL EVIDENCE.

See DEED III.
WILL, 1.

See DEED III.

PARTIES.

See APPEAL II. 1. INJUNCTION, I.

1. *J. R.* conveyed certain real and personal property to *A.* and *T.*, on trust, to pay the income to himself for life, and after his death to *B.* for life. The conveyance in trust was revocable by *J. R.* and *B.* jointly, and a deed of revocation was executed by them. After the death of *J. R.*, a bill was filed by *B.* against *A.* and *T.*, alleging that the execution of the deed of revocation by *J. R.* and himself had been fraudulently obtained by *A.*, and praying that the trust should be declared as subsisting unrevoked, and that the monies lost to the trust by means of the pretended revocation should be made good by *A.* and *T.* *Held*, that the personal representative of *J. R.* was a necessary party to the suit, he being interested in supporting the deed of revocation. *Richardson v. Arthur*, E. 12

2. *L.* being a partner in a firm of *E., M., & Co.*, by a deed of the — day of —, 1859, covenanted with *N. G., R. G.,* and *J. W.*, that they should be equally entitled to his share in the partnership, and that he would hold such share in trust for them. Subsequently *N. G., R. G.,* and *J. W.*, assigned all their estate to trustees for creditors, and shortly afterwards the firm of *E., M., & Co.* was dissolved, and a new partnership between *L.* and *W. W.*, under the style of *W. & L.*, established. By a deed to which *N. G., R. G., J. W.,* and their trustees, *L.* and *W. W.*, and the Bank of *N. & W.* were parties, *L.* covenanted that his share in the new partner-

ship should be in trust for the persons entitled thereto under the deed of the — day of —, 1859. *L., N. G., R. G.,* and *J. W.*, filed a bill against *W. W.*, only for an account of the partnership of *W. & L.*, alleging that the beneficial interest of *N. G., R. G.* and *J. W.* as *c. q. t.* of *L.*, did not pass by the assignment to their trustees, and that the trustees were not interested in the accounts of the partnership. On demurrer. *Held*, that *N. G., R. G.* and *J. W.*, might properly join *L.*, as co-plaintiffs, but that their trustees were necessary parties to the suit, inasmuch as the bill did not allege that they made no claim, but that they had no right; and the bill did not shew the latter by such clear detailed facts, as to excuse the making them parties. *Held*, also, that an allegation in the bill that the Bank of *N. S. W.* had been fully paid and made no claim on the funds or parties, dispensed with the necessity of having the Bank before the Court. *Little v. Williams*, E. 30

PARTNERSHIP.

See DEED III. INDEMNITY. PARTIES, 2.

On a gold-field; jurisdiction of Court of Mines.

See JURISDICTION IV. 2.

PENALTY.

I. *Unaccrued penalties under repealed enactment.*

The Act No. 149, having repealed the Act No. 117, before penalties under the 44th and 45th secs. of it could accrue, and having saved only penalties actually accrued; no penalties can now be recovered

PENALTY.

under the above sections of the repealed Act. *Adair v. Simson*, L. 13

II. *For illegal conveyancing: enactment by reference: repeal.*

The Act 11 Vic., No. 33, sec. 13, enacts by reference the provisions of the Act 5 Will. IV., No. 22, relating to the recovery of forfeitures and payments for offences under the referring enactment; and the repeal of the 5 Will. IV., No. 22, by the Act No. 159 left the provisions incorporated from the Act referred to in full force as if they had been enacted in full in the referring Act. *Fenton v. Dry*, L. 64

PERSONAL REPRESENTATIVE.

See PARTIES, 1.

PRACTICE (EQUITY) I.

PETITION.

See SEQUESTRATION II.
WINDING-UP ACT.

PLEADING (DIVORCE AND MATRIMONIAL).

See PRACTICE (DIVORCE, &c.) V.

PLEADING AT LAW.

See CONTRACT III.

I. *Essential matter insufficiently admitted or traversed.*

A marine policy on the "*Eli Whitney*" contained the following clause:—"Claims for losses or average to be payable by the Company at three months after settlement of the same." The insured brought their action. The declaration averred, *inter alia*, "That all condi-

PLEADING AT LAW. xxix

tions had been fulfilled, and all things happened to enable the Plaintiffs to be paid." Plea—"That three months after settlement of the claim of the Plaintiffs for the said alleged loss had not elapsed before suit." On demurrer to the plea, *Held*, that it was bad for not stating affirmatively the settlement, or facts dispensing with a settlement; and judgment for Plaintiffs. *O'ough v. Hopkins*, L. 55

II. *Special Defence.*

See JURISDICTION V. 1.

PLEADING IN EQUITY.

A general allegation that land sold to the Defendant was sold to and purchased by him with notice of the Plaintiff's title, is not sufficient to admit evidence of notice to the Defendant's vendor; and a case against the Defendant founded on such notice cannot be raised at the hearing. Notice of the Plaintiff's equity being proved only as against the Defendant in whom the legal estate was vested, and whose title was perfected by a registered conveyance from a mortgagee, in whom no notice was proved, the bill was dismissed, with costs. *Avery v. McArthur*, E. 75

PLEURO-PNEUMONIA.

Expiry of Act No. 136.

The "*Pleuro-pneumonia Act*," No. 136, did not continue the former Act, No. 123, but expired with it. *Stick v. Hudson*, L. 5

POINTING OUT.

See SEQUESTRATION I. 1, 2.

See PLEADING AT LAW I.

Guarantee against fraudulent defalcations: execution of deed evidence of membership before execution: construction of terms "immediately," "funds for the time being."

The *M. C. Association* issued to the *National Bank of A.* a guaranty policy against loss not exceeding £1,000, by the dishonesty of *E. L.* while in the employ of the Bank. The policy was subject to the following, among other, "terms and conditions:"—"Immediately upon "discovering or having notice that" any act has been committed or default made giving a right to a claim under the policy, the assured "must forward a written statement of all "the particulars thereof, so far as "the same shall have been then "ascertained to the board of directors or the general manager, and "this policy shall become absolutely "void both as to the then existing "and future claims and liabilities if "for thirty days after making such "discovery or having such notice "such statement as aforesaid shall "be omitted to be forwarded." The policy was signed by *W. G.* and *J. B.*, as "directors" of the association, was dated November 20, 1862, and was granted under the Deed of Constitution of the Association. This deed was dated July 1, 1862, but it was not executed by *W. G.* until December 2, 1862, and by *J. B.* until January 1, 1863. The *National Bank of A.* having suffered a loss by the fraudulent defalcations of *E. L.*, a "statement" of their claim was sent in to the association. The loss was discovered May 11, 1863; the clerk absconded May 12, leaving his defalcations confessed generally but not ascertained in

detail; the "statement" of loss and claim was sent in May 29, when a net loss of £747 0s. 7d. was stated and claimed; negotiations followed, further particulars were asked for on December 3; and on December 5, the Bank sent in full particulars of the defalcations, making a net loss of £765 13s. 7d., which they claimed. The policy provided that "the funds for the time being of the "said association shall alone, according to the Deed of Constitution "thereof, be liable to answer and "make good any loss," &c., "and "that no member shall in any "manner be personally liable or "subject to any claim or demand by "reason of this policy beyond such "funds (which include the amount "liable to be called for from him "under the said deed)," &c. The 57th clause of the deed declared that all premiums and calls should be applied "in payment of the costs "of preparing and perfecting these "presents, and printing copies thereof, and in carrying on the business "and paying the expenses of management of the association, and after "retaining such a sum as the board "shall consider sufficient to fulfil "the engagements entered into on "account of the association, the "clear surplus shall form a reserve "fund for answering such engagements," &c. In an action upon this policy to recover losses by the fraudulent defalcations of *E. L.* from *W. G.* and *J. B.*, who signed the policy as "directors," they pleaded:—(1) That they were not "members" of the association at the date of the policy; (2) that a statement of all the particulars of loss was not delivered by the Bank immediately after discovery or notice of the loss; (3) that the funds of the association were not sufficient to

POLICY.

satisfy the claim. The verdict was for the Plaintiffs. On rule *nisi* to enter a nonsuit or for a new trial, *Held*—1. That the deed dated 1st July, 1862, reciting that the Defendants were parties, was evidence of their being "members" of the association on that date, although the deed was not executed by one of them till December 2, 1862, and by the other till January 1, 1863. 2. That though the first part of the second "condition" of the policy prescribed delivery of the statement of loss "immediately," yet to give effect to the last part of the condition it was necessary to hold that the word "immediately" might embrace twenty-nine days; that the acts and conduct of the parties must be regarded in order to ascertain not merely whether the statement was delivered "immediately," but also whether it was a statement of "all the particulars" of the claim, within the meaning of those words as used in the "terms and conditions" of the policy; and that there was evidence on behalf of the Plaintiffs to go to the jury on the issue whether the statement was made "immediately" and contained "all the particulars." 3. That the "funds for the time being" of the association out of which the Plaintiffs might recover did not mean "the balance of funds after deducting all existing liabilities," and that therefore evidence of those liabilities was properly rejected. *National Bank of Australasia v. Brock*, L. 209

POVERTY.

See PRACTICE (INSOLVENCY) IV. 1.
REOPENING ACCOUNTS.

POWER.

Of appointment of new trustees.
See TRUSTEE, 3.

PRACTICE AT LAW. xxxi

I. Appeal.

See APPEAL, I.

II. Costs.

See ARBITRATION AND AWARD.
PROHIBITION.

III. Enlargement of Term.

See JURISDICTION, I. 1.

IV. Filing articles nunc pro tunc.

See ARTICLES CLERK, II.

V. Prohibition.

See PROHIBITION.

VI. Service of summons.

1. Service of a summons for debt by Complainant at a house he alleges to be the last known place of residence of the Defendant, when the Defendant is really, to the knowledge of the Complainant, gone from the house into gaol, is insufficient service. *Regina v. Foster*, L. 8

2. Execution of a conviction based on a summons so served will be prohibited. If the point was taken below, such prohibition will be with costs against the Complainant below. *Ibid.*

PRACTICE (DIVORCE AND MATRIMONIAL).

I. Alimony.

After judgment has been given on a petition by the husband for divorce, if it is adverse to the wife, and she can establish a *prima facie* case entitling her to alimony, she may apply to the Court to postpone the registration of the decree, and a convenient time may be fixed when the motion for alimony can be entertained, but it is absolutely essential

that there should be evidence establishing a *prima facie* title to alimony. *Terry v. Terry*, I. E. & M. 78

II. Citation.

1. *Service of*.—In a suit by the wife for judicial separation where the Respondent had absconded, and the Petitioner stated upon affidavit that she had been unable, after diligent enquiries, to gain any intelligence of him, and believed from the answers to her enquiries that he had left the colony, the Court refused to dispense with service upon the Respondent; but upon further affidavits stating where the Respondent was supposed to be, directed substituted service by advertisements in that place. *McNulty v. McNulty*, I. E. & M. 85

2. *Proof of service of*.—Service of a citation in England may be verified by the affidavits of persons resident there, if explicit and satisfactory.—*Constable v. Constable*, I. E. & M. 88

III. Costs.

Where, on a petition by the husband for divorce, no redress can be obtained against the co-respondent he ought not to be called upon to pay costs. *Terry v. Terry*, I. E. & M. 78

IV. Custody and maintenance of children.

1. Interim orders for the custody and maintenance of children may be made under sec. 22 of "*The Divorce Act*," where the children have no property. *Jones v. Jones*, I. E. & M. 87

2. The same presumption as to the wife's innocence will be made on an application for the custody and maintenance of children under

sec. 22 of "*The Divorce Act*," as on an application for alimony. *Ibid.*

V. Objections not pleaded.

Although the Court may itself take cognizance of objections to a petition by the husband for divorce on the ground of neglect, connivance, or condonation if they appear upon the evidence, the Respondent cannot urge them unless raised by the pleadings. *Terry v. Terry*, I. E. & M. 78

VI. Service.

See SUPRA, II.

PRACTICE (ECCLSIAS- TICAL).

I. Affidavit.

1. So much of the executor's affidavit required by the Rules of Court, as relates to the verification of the will, is part of the materials upon which probate should be granted; and in the absence of this, probate will not be granted, although the will is verified by another affidavit. The other part of the executor's affidavit may be in another document, and may be filed at any time before issue of the probate from the office. *In re Grant*, I. E. & M. 64

2. Where a will consists of several sheets, the last of which only is signed by the testator, the affidavit in support of an application for probate ought to specify, and by some mark indicate, that each sheet was the subject matter of the testator's discretion, and each sheet of the will should be marked by the Commissioner before whom the affidavit is sworn as being referred to by the affidavit. *In re Black*, I. E. & M. 72

3. Upon application for letters of administration, the Court will not

PRACTICE (ECCLESIASTICAL).

act upon statutory declarations where affidavits may be obtained. *In re Hone and Pender*,

I. E. & M. 73

II. *Caveat*.

1. Although by the Rules of Court a caveat against application for letters of administration should be filed within a certain time, yet if at any time before the order is made a caveat is filed it has operation. *In re Carroll*,

I. E. & M. 66

2. Upon an application for letters of administration the Court has a discretion as to letting in a party to be heard, although his caveat may have been lodged without the time fixed by the rules. *In re Jones*,

I. E. & M. 67

III. *Executrix according to the tenor*.

H. C. by his will desired that the whole of his properties, &c., be equally divided amongst his children, but not till after the decease of his wife to whom he entrusted during her life all his properties, &c., for the maintenance of herself and children, and left the management to his wife with the advice of trustees named: *Held*, that probate could not be granted to the widow as executrix according to the tenor, but order made for a grant to her of administration *cum testamento annexo*, allowing her to enter into the administration bond without sureties. *In re Cooper*,

I. E. & M. 68

IV. *Non-appearance at hearing of suit*.

Where in an Ecclesiastical suit the Plaintiff does not appear at the hearing, an order dismissing the bill is not necessary, an entry by the Judge of the Plaintiff's default in appearance being alone requisite. *Carroll v. Carroll*,

I. E. & M. 69

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PRACTICE (ECCLESIASTICAL). xxxiii

V. *Probate, grant of*.

See WILL.

1. In a testamentary paper sought to be proved as a will, the only words relating to the appointment of executors were—"Trees. and "Exors.—*Louis Kitz*, of Geelong, "watchmaker; *Robert McDonald*, of "Geelong, chemist:" *Held*, that as between the grant of probate, or of administration *cum testamento annexo*, probate might be granted. *In re Amiel*,

I. E. & M. 65

2. *E. R.*, being domiciled in England, made a will there relating exclusively to property in Great Britain and appointed executors in England. He then came to Victoria and made a second will relating exclusively to property in Victoria and Tasmania, and appointed executors of it resident in Victoria. The Court of Probate in England having granted probate of the first will without referring to the second, the Supreme Court of Victoria granted probate of the second will without referring to the first. *In re Buffhead*,

I. E. & M. 70

PRACTICE (EQUITY).

I. *Administration suit*.

The Court will not entertain an administration suit until there is a full personal representative before the Court, and the obtaining an order for letters of administration without the letters being taken out does not constitute such a representative. *McLachlan v. McCallum*,

E. 110

II. *Affidavit*.

An affidavit verifying the bill as against a Defendant, who has left the suit undefended, is necessary, though no answer be required from such Defendant; and such affidavit

should generally be made by the Plaintiff himself. *Palmer v. Bronckhorst*, E. 61

III. Arbitration.

Where a submission provided that application to make it a rule of Court should be made to the "Supreme Court of Victoria," such application may even in Term, and when the full Court is sitting *in banco*, be made to a single Judge sitting in Equity; and when an award has been made, the award as well as the submission should be made a rule of Court. *McMeckan v. White*, E. 165

IV. Attachment.

1. A writ of attachment for non-payments of costs may issue from the office upon the mere production of the subpoena for costs, and an affidavit of its service and of demand and non-payment; and no order of the Court for its issue is necessary. *Evans v. Guthridge*, E. 49

2. A party should only be discharged from an attachment for non-payment of costs upon paying, as well as the costs endorsed upon the writ of attachment, the costs of the certificate upon which the subpoena for costs was based, of the subpoena itself, and of the attachment. *Ibid.*

V. Commissioner to take acknowledgment of married woman.

A special commission is necessary to take the acknowledgment of a married woman, under No. 112, s. 87, in a place where there is a perpetual Commissioner of this Court; for the power of appointing general Commissioners does not extend to this case. *In re Sargood*, E. 48

VI. Costs.

1. An official assignee who takes no interest in property settled upon the wife of the insolvent, but who is made a party to a suit respecting such property, is entitled to his costs against the Plaintiffs. *Woodward v. Jennings*, E. 1

2. An official assignee of a person taking a beneficial interest under a settlement, who refuses when applied to to become a co-plaintiff, but does not then disclaim, and is therefore necessarily made a defendant, is not entitled to his costs. *Ibid.*

VII. Demurrer.

Where a Plaintiff did not set down a demurrer for argument within eight days after its delivery; Order made *ex parte* that Plaintiff should pay the costs of the demurrer and suit. *Fisher v. Jacomb*, E. 97

VIII. Exhibits.

The rule of Court requiring exhibits to be lodged in and retained by the Master's office, is only intended to preserve such exhibits until the hearing; and when that purpose is served, the custody should terminate. *Sehwood v. Burstall*, E. 96

IX. Guardian ad litem.

Upon motion for the appointment of a guardian *ad litem* to infant Defendants, if any of the infants are of an age of discretion, there should be an affidavit of their assent to the proposed guardian. *McCrae v. Rutherford*, E. 164

X. Infant.

An infant foreclosed is entitled to a day to shew cause notwithstanding

PRACTICE (EQUITY).

ing "*The Trustee Act 1856.*" *Bank of Victoria v. Cozens*, E. 93

XI. Injunction.

The rule that all material facts must be brought forward on obtaining *ex parte* injunctions is a useful one; but care must be taken not to carry it too far, by which prolixity would be produced. *Lavezzolo v. Mayor of Daylesford*, E. 113

XII. Master's Report.

A report will on the application of any party to the suit be referred back to the Master when his finding is unauthorised by the decree and opposed to the case made by the bill. *Kendell v. Thomson*, E. 141

XIII. Notice of motion.

1. A notice of motion to dissolve an injunction should be directed not only against the writ of injunction, but also against the Order of the Court under which the writ was issued. *Murphy v. Martin*, E. 26

2. Sunday does not reckon in the computation of the two clear days' notice required for a notice of motion. *Brown v. Healy*, E. 47

XIV. Receiver.

When a receiver, appointed at the instance of the Plaintiff, left the colony and the Plaintiff took no steps for the appointment of a new receiver: *Held*, that a defendant, an annuitant, whose annuity was in arrear, was entitled to move for the appointment of a new receiver; and that the Plaintiff, although rightly served with notice of the motion, was not entitled to his costs of appearing upon it. *Pittman v. Townshend*, E. 140

PRACTICE (EQUITY). xxxv

XV. Service.

The 13 *Vic.* No. 31, sec. 1, enabling the Court to authorise substituted service "upon the receiver, steward, agent, or other person receiving or remitting the rents of the premises, if any, the subject matter of the suit," does not, where the property is in fact producing no rent, authorise substituted service upon an agent empowered to receive the rents of the property in question. Upon a motion under the general jurisdiction of the Court leave was given to substitute service of the bill and summons upon an agent under power, who was empowered by the Defendant to receive the rents of the property the subject matter of the suit, and bring or defend any actions or suits referring to it. *Duhig v. Shannon*, E. 25

XVI. Winding-up Act.

See WINDING-UP ACT.

PRACTICE (INSOLVENCY).

I. Affidavit.

1. In a petitioning creditor's affidavit of debt it is not necessary to negative the existence of a security where none exists. *In re McManomonic*, I. E. & M. 53

2. The non-numbering of the folios of affidavits in support of a petition for sequestration is to be regarded before making an Order *nisi* for sequestration, but not as cause against it. *Ibid.*

II. Appointment of new trustee under 5 *Vic.*, No. 17, sec. 57.

1. An application for the appointment of a new trustee of an insolvent estate under 5 *Vic.*, No. 17, sec. 57, in place of an official

assignee, erroneously appointed, should be made either on notice to such official assignee or with his concurrence. *In re Rucker*,

I. E. & M. 39

2. The confirmation by the Court of the election of a new trustee under 5 *Vic.*, No. 17, sec. 57, need not be at the next sitting of the Court. *Ibid.*

III. *Certificate of discharge.*

1. Upon motion under the rider to 10 *Vic.*, No. 14, for the grant of an insolvent's certificate, the consent of the creditors, and the fact that the parties consenting are all the creditors, should be verified by the affidavit of the solicitor of the insolvent and not by the insolvent himself. *In re Handasyde*,

I. E. & M. 62

2. Such application may be either by rule *nisi* on the official assignee or upon notice to him, or there may be a consent by the official assignee duly verified; but a single day's notice to the official assignee is not sufficient. *Ibid.*

IV. *Enlargement of Order nisi for compulsory sequestration.*

1. Application for an enlargement of an Order *nisi* for sequestration on the ground that accounts were pending in the Master's office between the alleged insolvent and the petitioning creditor, which, when completed, would shew a balance due from the petitioning creditor; or failing that, for leave to file objections *nunc pro tunc* that the alleged insolvent was not really indebted to the petitioning creditor on certain judgments the foundation of the Order *nisi*, such judgments having been obtained by

default by reason of the Defendant's poverty, refused. *In re Mc Manomonie*,

I. E. & M. 53

2. Where an Order *nisi* sequestrated an estate until a given day "or further order," and such Order was not enlarged on the day named, there being on that day no single Judge sitting: *Held*, that the insolvency did not thereby lapse. *Ibid.*

V. *Proceedings before Chief Commissioner.*

The Chief Commissioner is the judge of what degree of delay and indulgence is to be given to persons appearing before him, and the Court has no jurisdiction to control his movements in those points. If he decides erroneously, because too hastily, an appeal is the proper remedy. *In re Bradley*,

I. E. & M. 11

VI. *Proof of Debt.*

1. The Chief Commissioner received proof of a debt under circumstances amounting to a surprise upon the official assignee, admitted the debt as proved, and afterwards refused to re-open the matter. The official assignee petitioned, praying that the proof might be expunged, and the Chief Commissioner be directed to rehear the matter. Petition dismissed with costs. *Ibid.*

2. Upon a proof of debt by a judgment creditor the Court cannot review the judgment, except upon the grounds of an equitable defence or of collusion between the insolvent and the creditor in obtaining the judgment; the latter being a ground which it is open to a creditor to raise, but not to the insolvent himself. *Ex parte Gregory*, *In re Royce*,

I. E. & M. 57

VII. *Service of summons.*

1. An alleged Insolvent being out of the jurisdiction, the petitioning creditor, without obtaining an order for substituted service, advertised the summons under 5 *Vic.*, No. 17, sec. 25: *Held*, that such advertisements are only proper when the debtor remains in Victoria, and is evading service; that the advertisements in this case were, under the circumstances, nugatory; and order *nisi* enlarged, with liberty to the petitioning creditor to apply for an order to substitute service. *In re Smith*, I. E. & M. 1

2. Filing notice of objections, one of them being upon the ground of the irregularity of the proceedings, does not preclude an alleged insolvent from objecting to insufficiency of service. *In re Newbigging*, I. E. & M. 33

3. Where the Insolvent cannot be served personally, he must be served under the provisions of "*The Common Law Practice Act*," or a special order must be obtained. *Ibid.*

PREFERRING CREDITOR.

Where the consideration for a conveyance, executed within sixty days preceding an order for sequestration of the grantor's estate, is the release of a debt due by the grantor to the grantee, such conveyance is a "preferring" of the releasing creditor within the meaning of 5 *Vic.*, No. 17, sec. 8. *Jacomb v. Donovan*, E. 66

PRESUMPTION.

I. *Of death after seven years' absence.*

1. The seven years of absence, without being heard of, from which death may be presumed, may be

proved in separate definite portions of time, by different competent witnesses. *Rockford v. Jackson*, L. 23

2. In ejectment by *James R.*, claiming as heir-at-law of his uncle; to prove the death of *John R.*, elder brother of *James*, such evidence was given of *John's* absence from his last residence during seven years, unheard of by those who would have heard of him if he were not dead, that a jury *might*, on that evidence, have presumed *John's* death; *Held*, per *Barry, J.*, and *Williams, J.*, that the jury were not on such evidence bound to presume *John's* death, but were at liberty to draw the inference of his death, or reject it, according to their conclusions on the whole case; *Stawell, C. J.*, dissenting, and holding that the presumption was one of law, which the jury *ought* to draw, if according to the rules of evidence they might draw it from the facts. *Ibid.*

II. *Of innocence.*

See PRACTICE (DIVORCE, &c.) IV. 2.

III. *Of law does not alter fact.*

See LARCENY I.

PRIORITY.

See REGISTRATION, II.

PRIVITY OF CONTRACT.

See MISTAKE.

PROBATE.

Grant of.

See PRACTICE (ECCLESIASTICAL)

I. 1, 2, III., V.

PROCLAMATION.

See SPECIFIC PERFORMANCE.

Whether a proclamation speaks

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from its date or from the time of its publication—*quere. Kennedy v. The Queen,* E. 145

PROHIBITION.

I. *By Common Law Judge in vacation.*

A rule for prohibition may be obtained under the Act 15 *Vic.*, No. 10, sec. 19, from a Judge hearing common law business in chambers in vacation, during the sitting of a Judge in the equity jurisdiction. *Dennis v. Vivian,* L. 201

II. *Costs.*

See PRACTICE AT LAW, VI. 2.

Where magistrates in petty sessions had wrongly convicted a person for illegally impounding horses, when he had but seized with intent to impound, and then abandoned his intention, but where the horses had been injured, the Supreme Court granted the Defendant a rule for prohibition, but refused him costs, on the Plaintiff undertaking to bring no action. *In re Rawlings and Motherwell, Ex parte Mahoney,* L. 22

PROOF OF DEBT.

See PRACTICE (INSOLVENCY) VI.

PROTEST (PAYMENT UNDER).

Before action for excessive distress.

See ACTION, V.

PUNISHMENT.

Of insolvent under 7 Vic., No. 19, sec. 19.

See INSOLVENT.

QUARTZ REEF DRAINAGE.

See APPEAL II. 1.

RAILWAY COMPANY.

See WINDING-UP ACT, 5.

RAILWAYS.

Management of.

See ARREST.

RAPE.

Details of complaint by prosecutrix inadmissible.

On an information for rape, witnesses called to corroborate the statement of the prosecutrix that she complained, can only be examined by counsel for the prosecution, as to whether complaint was made; and cannot be asked to state any details of the complaint, and where a witness stated the terms of the complaint, and in the complaint the prisoner was spoken of by name as the offender, a conviction following on such evidence was quashed. *Regina v. Cooper,* L. 123

RATE.

See APPEAL IV.

I. *Validity of: where may not be inquired into.*

See ACTION V.

II. *What is exempted from as a "mine" under No. 176, sec. 181.*

D. and party, L. and party, and C. and party, were rated by the S. Road Board under the Act No. 176, sec. 181, for land. Each party appealed to the General Sessions on the ground that their land was a "mine," and exempt from rates

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under sec. 181. Their appeals were dismissed, and cases stated for the Supreme Court. The land held by *D.* and party was held under miners' rights. On it was a gold-mine, worked by them, and buildings, and a steam-engine and machinery for crushing quartz. They used this machinery to crush the quartz raised from their own said mine, and also to crush quartz from other adjoining mines, held by them under miners' rights, along with other persons not interested in the land rated. The land held by *C.* and party was held under a lease from the Crown. On it was a gold-mine worked by them, and an engine and machinery. They used this machinery to crush the quartz from their own said mine, and also to crush quartz from other adjoining claims held by them; and also to crush for reward the quartz of strangers. The land held by *L.* and party was held by lease from the Crown. On it there was no gold-mine, but a steam-engine and machinery. They used this machinery to crush quartz from gold-mines situated near, and held under miners' rights by them with other persons not interested in the land rated. In all three cases it was stated that the quartz containing the ore on being raised to the surface was not merchantable nor usually sold; but that the gold extracted by crushing was merchantable on leaving the machinery: *Held*, that in neither of the three cases was the land exempt from rates; and appeals dismissed. *Davidson v. The Stawell Road Board*, L. 79

RATE BOOK.

Prima facie evidence only of validity of rate.

See EVIDENCE, II.

REAL PROPERTY ACT. xxxix

See CAVEAT II.

RECEIVER.

See PRACTICE (EQUITY) XIV.

RECRIMINATORY CHARGES.

See ALIMONY.

RECTIFICATION.

See MISTAKE.

REFERENCE.

Enactment by.

See PENALTIES, II.

REGISTRATION.

I. *Of Bill of Sale.*

1. A mortgage deed of mining plant and machinery does not require to be registered under the Act No. 109, sec. 28, where the mortgagee is in possession. *Oriental Bank v. Carter*, L. 38

2. The word mortgage was intentionally omitted from the latter part of the Act, No. 109, sec. 28, respecting registration. *Ibid.*

II. *Of Deeds.*

Registration is only important in deciding priority between inconsistent conveyances, each of which would be effectual but for the other; but gives no increased efficacy to conveyances impugned for fraud or mistake. *Sutherland v. Peel*, E. 18

REHEARING.

By Court of Mines: once only.

The Act No. 32, sec. 70, gives the Court of Mines power to grant but one rehearing of a hearing or an appeal. *Dennis v. Vivian*, L. 201

21 REJECTION OF EVIDENCE.

By magistrates.

See EVIDENCE III.

RELEASE.

Of debt.

See PREFERRING CREDITOR.

REMOVAL.

See TRUSTEE, 1.

RE-OPENING ACCOUNTS.

Where a Defendant through poverty is unable to attend in the Master's office when accounts are taken against him, this is no ground for permitting him to re-open those accounts, and if relief be given him it will only be upon payment both of the costs of the account and of the application. *Kendell v. Thomson,* E. 144

REPEAL.

See PENALTIES I., II.

REPLEVIN.

See ACTION V.
DISTRESS II.

REPORT.

See PRACTICE (EQUITY) XII.

RESERVATION.

By Crown grant and subsequent proclamation.

See CROWN GRANT.

RESIDENCE.

Name and, of "transient offender," under Act No. 186, sec. 31.

See ARREST.

REVENUE.

See CROWN REVENUES.

REVIVAL.

Of Sequestration.

See SEQUESTRATION III.

REVOCATION.

See PARTIES, 1.
WILL, 2.

RIGHT OF WAY.

Reservation of.

See CROWN GRANT.

RIGHT TO BE HEARD.

See WINDING-UP ACT, 4.

ROADS.

Second toll on same day.

Under the Acts 16 Vic., No. 40, sec. 20, and No. 176, sec. 249, a second toll is demandable for the same horses and wagon, going in the same direction, on the same day. *Ryan v. Polworth,* L. 6

RULES OF SUPREME COURT.

See BARRISTER.

SALE.

See CONTRACT I.
JURISDICTION II. 2.
MORTGAGE, 2.
SEPARATE ESTATE.

SECURITY.

See PRACTICE (INSOLVENCY) I. 1.

If a creditor think fit to get a new security, whatever its force, he will not in a Court of Equity be

SECURITY.

allowed to use it and at the same time enforce all his antecedent rights. *Murphy v. Martin*, E 26

SELECTION.

Of Crown lands.

See SPECIFIC PERFORMANCE.

SEPARATE ESTATE.

M., trustee for *W.*, a married woman, made advances to her on her promise to repay him out of the rents of the trust property. *M.* and *W.* afterwards mortgaged. On bill by *M.* against *W.* to enforce his charge, *W.* was ordered to give up possession to *M.*, who, subject to the rights of the mortgagee, was to retain the rents in satisfaction of his advances, interest, and costs. *Semble*.—In giving relief to the creditors of a wife's separate estate such relief will not be confined to decreeing payment out of rents and profits, but a sale of the *corpus* of real estate may be directed. *Michael v. Wakefield*, E. 186

SEQUESTRATION.

I. Act of Insolvency.

1. A judgment debtor, when called upon to satisfy the debt, or point out property to satisfy it, must, in order to avoid the commission of an act of insolvency within the 5 *Vic.*, No. 17, sec. 5, either satisfy, or point out property within the circuit district of the sheriff to whom the writ of execution is addressed. *Ex parte Staughton, In re Hewitt*, I. E. & M. 15

2. When a judgment debtor is required, under 5 *Vic.*, No. 17, sec. 5, to "point out disposable property," the mere assertion by him that he has property is not a sufficient pointing out; and the person

SEQUESTRATION. xli

who relies upon such assertion must afford evidence of its truth, and not merely prove that he made such a statement. *Ex parte White, In re Hewitt*. I. E. & M. 24

II. Petition for.

See *Infra* III. 1.

1. All executors must join in a petition for the compulsory sequestration of the estate of a debtor to their testator's estate. *Treasure v. Jones* considered, and held not binding in Victoria. *Ex parte Staughton, In re Hewitt*, I. E. & M. 15

2. A petition for compulsory sequestration averred that the debtor having the sentence of a competent Court against him, and being thereunto required by a proper officer, did not satisfy the same or point out sufficient property to satisfy the same; but did not state that the officer failed to find sufficient property to satisfy the sentence: *Held*, that the petition did not sufficiently set forth the alleged act of insolvency; leave to amend refused; and Order *nisi* discharged without costs. *In re Fisher*, I. E. & M. 31

III. Revival of.

1. A petition under 5 *Vic.*, No. 17, s. 28, for revival of a sequestration alleged default of the petitioning creditor, and also collusion between him and the Insolvent as to the discharge of the rule *nisi* for sequestration; but no such collusion was proved: *Held*, that proof of default alone was sufficient, without collusion, and that the allegation in the petition of collusion was to be regarded as mere surplusage. *Ex parte Staughton, In re Hewitt*, I. E. & M. 15

2. It is not necessary that a creditor seeking to revive a sequestra-

tion, should prove that the original petitioning creditor's debt was a good one, although he must prove the insolvency in other respects, and prove his own to be a good petitioning creditor's debt. *Ibid.*

3. The debt of a creditor seeking to revive a sequestration under 5 *Vic.*, No. 17, s. 28, is sufficient if incurred prior to the order for sequestration, and need not have been incurred prior to the act of insolvency relied on. *Ex parte White, In re Hewitt*, I. E. & M. 24

4. Where two of three executors have applied under 5 *Vic.*, No. 17, s. 28, for a revival of a sequestration of the estate of a debtor to their testator's estate, and such application has been refused on the ground that two out of three executors were not entitled so to apply; such refusal is no bar to a subsequent application by another creditor for revival. *Ibid.*

5. Upon an application under 5 *Vic.* No. 17, s. 28, to revive a sequestration, the original petitioning creditor need not be served with notice of the application. *Ibid.*

SERVICE.

See PRACTICE (DIVORCE, &c.) II.
 ——— (EQUITY) XV.
 ——— (INSOLVENCY) VII.
 WINDING-UP ACT, 1.

SETTLEMENT (VOLUNTARY).

See CERTIFICATE, REFUSAL OF, V.

A settlement executed in anticipation of the possible result of pending litigation may be as fraudulent as if executed after the result is known. *In re Solomon*,

I. E. & M. 45

SHAREHOLDER.

See WINDING-UP ACT, 1.

SHERIFF.

Circuit Districts.

See SEQUESTRATION I. 1.

SIGNATURE.

To will.

See PRACTICE (ECCLESIASTICAL)
 I. 2.

SPECIFIC PERFORMANCE.

Crown lands were by proclamation dated 7th August declared open for selection on and after the 10th September. By a subsequent proclamation, dated on the 8th, but gazetted only on the 11th September, certain allotments were, under the 46th sec. of the "*Land Act*," withdrawn from selection "on account of improvements." On the 10th of September, *K.* applied to select one of these allotments, paid to the land officer the purchase-money for subdivision A, and one year's rent in advance for subdivision B, and received from him a receipt and certificate of selection. On petition by *K.*, under the Act No. 49, for specific performance of the alleged contract for sale to him: *Held*, that the reason assigned for withdrawing the land was sufficient; that the land was effectually withdrawn from selection on the 10th September by the order of the 8th, although not published until the 11th, and petition dismissed with costs. *Kennedy v. The Queen*,
 E. 145

STAMPS.

On Weights and Measures.

See WEIGHTS AND MEASURES.

STATUTE OF FRAUDS.

See CONTRACT I.

STATUTES (IMPERIAL).

13 *Eliz.*, cap. v.

See CERTIFICATE, REFUSAL
OF, V.
FRAUDULENT CONVEY-
ANCE.
SETTLEMENT.

54 *Geo.* III., cap. xv.

Sec. 4 :

See ACTION IV.

11 *Geo.* IV. and 1 *Gul.* IV., cap.
xlvii.

See JURISDICTION II. 2.

11 & 12 *Vic.*, cap. xlii.

Sec. 11 :

See JURISDICTION V. 2.

Sec. 17 :

See DEPOSITIONS.

11 and 12 *Vic.*, cap. xliii.

Sec. 11 :

See JURISDICTION V. 2

STATUTORY DECLARA- TIONS.

See PRACTICE (ECCLESIASTICAL)
I. 8.

STREET.

See ACTION I., II.
CORPORATION 1.

SUBSTITUTED SERVICE.

See PRACTICE (DIVORCE, &C.) II.
——— (EQUITY) XV.
——— (INSOLVENCY) VII.

SUMMONS.

Service of.

See PRACTICE (INSOLVENCY) VII.

SUNDAY.

See PRACTICE (EQUITY) XIII. 2.

SURETIES.

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To administration bond.

See PRACTICE (ECCLESIASTICAL)
III.

SURPLUSAGE.

See SEQUESTRATION III. 1.

SURPRISE.

See PRACTICE (INSOLVENCY) VI. 1.

SURVEYOR (DISTRICT).

See AGENT.

TENANT.

*Holding of, from year to year, not
terminated.*

See LICENSE III.

TENDER.

See ACTION V.
BILL OF SALE.

TERM.

Enlargement of.

See JURISDICTION I. 1.

TERRITORIAL LIMITS.

Of jurisdiction.

See JURISDICTION IV. 1.

TIME.

For payment of calls.

See DEED I.

TOLL.

See ROADS.

TRADE OR BUSINESS.

See BARRISTER.

See FRAUDULENT PREFERENCE.

TRANSIENT OFFENDER.

See ARREST.
JURISDICTION V. 1.

TRUSTEE.

See INDEMNITY.
PARTIES, 1, 2.
PRACTICE (INSOLVENCY) II.
SEPARATE ESTATE.
"TRUSTEE ACT 1856."

1. Permanent absence from the colony, resulting in injury to the trust estate, is a sufficient ground for the removal of a trustee, although the testator may have known of such permanent absence when appointing him a trustee. *Knox v. Postlethwaite*, E. 62

2. By an assignment in trust for creditors it was provided that no creditor should be entitled to receive a dividend upon any greater sum than the trustee should certify to be due; and that the trustee should act under the direction of a meeting of creditors. On rule *nisi*, under 7 *Vic.*, No. 19, sec. 9, by a creditor for payment of a dividend on a debt claimed by him, but which the trustee refused to certify, and under direction of a meeting of creditors, declined to pay a dividend upon: *Held*, that it was the duty of the trustee to exercise such a discretion as the deed reposed in him, and rule discharged; but, it appearing that its provisions came upon the applicant as a surprise, without costs. *Ex parte Nathan, In re Barnett*, E. 107

3. When the Court has taken the management of a testator's property into its hands, a power in the will to appoint new trustees cannot pro-

perly be exercised without its sanction, *Mortimer v. Braithwaite*, E. 139

"TRUSTEE ACT 1856."

A testator devised all his real estate to *B.* upon trust for sale. Probate of another instrument purporting to be a later will of the testator was obtained. *B.* formally disclaimed the trusts of the original will. Upon petition by the beneficiaries under that will, averring that they were desirous of testing the validity of the will by commencing actions of ejectment, but were unable to do so by reason of *B.* refusing to act or to allow his name to be used in any action, and that the heir-at-law of the testator could not be discovered: *Order* made, without confirming the validity of the first will, for the appointment of a new trustee, and for vesting in such new trustee the property devised by the first will. *In re Barnes*, E. 72

UNDEFENDED SUIT.

See PRACTICE (EQUITY) II.

VESTING ORDER.

See "TRUSTEE ACT 1856."

VOLUNTARY CONVEYANCE.

See CERTIFICATE, REFUSAL OF, V.
FRAUDULENT PREFERENCE.
SETTLEMENT.

WAIVER.

See APPEAL IV. 1.

WARDEN.

See APPEAL II.

WARRANT.

See DISTRESS II.

WARRANTY.

Where none implied.

See CONTRACT III.

WASTE.

See INJUNCTION I.

WATER RATES.

See DISTRESS I.

WEIGHTS AND MEASURES.

I. *Weighing machine : comparing with standards : stamping.*

1. Whether under the Act No. 151, a weighing-machine of capacity to weigh over 56 lbs. need, so far as the owner is concerned, be compared and stamped by the inspector, *quære. Council of Borough of Ballarat v. O'Connor*, L. 1

2. Under the Act No. 151, the owner of every weighing machine is compelled to have it true and correct, and it is the duty of the inspector to examine and compare every machine on payment by the owner of the proper fees; and in comparing a machine capable of weighing over 56 lbs., the inspector may use other weights beside the standards supplied by the Government, if such additional weights have first been verified by the standards. *Ibid.*

WIFE.

See FEME COVERT.

HUSBAND AND WIFE.

WILFUL DEFAULT. xlv

See LANDLORD AND TENANT.

WILL.

See EXONERATION OF MORTGAGED LANDS.

PRACTICE (ECCLESIASTICAL)

I. 2, III., V.

"TRUSTEE ACT 1856."

1. Where a will was not duly executed, but a subsequent codicil duly executed referred to a previous will: *Held* that parol evidence might be admitted to connect the unattested will with the will spoken of in the codicil; and probate granted of the will and codicil. *In re Hill*, I. E. & M. 63

2. A testator left a will and three codicils. The second revoked certain legacies, confirmed another, and appointed two additional executors. The third did not notice the second, but revoked the legacies previously revoked, and also that previously confirmed, and confirmed the will in every particular not thereby altered or revoked: *Held*, by the full Court, reversing *Molesworth, J.*, that the third codicil in no way affected the appointment of executors by the second codicil, and probate of the will and three codicils granted. *In re Stephenson*, I. E. & M. 73

3. A testator, after directing payment of his debts by his wife, disposed of his property in the following words:—"The rest residue and remainder of my worldly goods such as carts horses moneys or property of what nature or kind soever which God in his goodness hath bestowed upon me shall be for the sole use and benefit exclusively of my aforesaid wife," and he afterwards appointed her executrix. *Held*, that the testator's real estate was thereby effectually devised. *Bamblat v. Bamblat*, E. 81

1. By an order under 11 *Vic.*, No. 19, s. 17, made upon the petition of the official and creditors' assignees of a joint-stock company, the Chief Commissioner was directed to settle a list of shareholders and advertize the same, with notice that the shareholders therein named were, if they thought fit, to come in before him and dispute their liability in respect of their shares, on a peremptory day to be fixed for that purpose, and that in default of their so coming in, each shareholder would be held liable in respect of such shares. The order also directed a copy of such notice to be served on each shareholder: *Held*, that the meaning of the order should be taken to be, that an advertisement should be published requiring the persons named in it to appear at the day fixed, and that upon their respectively appearing, they should admit or deny the liability attributed to them, and in the latter case have it ascertained; but that the advertisement threatening them with being bound by the list, in default of appearance, should be regarded as a *brutum fulmen*, and that no shareholder could be bound until service upon him requiring him to show cause, or his voluntary appearance: *Held*, also, that there was no necessity to shew service upon all in the list before proceeding in the inquiry as to any. Difficulties having arisen in the prosecution of the above order, the Court, upon the *ex parte* application of the Petitioners,

varied and added to the original order in certain respects. *In re Provident Institute of Victoria*,

I. E. & M. 3

2. On the hearing of a petition under the "*Companies Statute 1864*," for an order to wind up a company, the Court will not, at the instance of Plaintiffs in a suit against the company, give leave to proceed with the suit, notwithstanding the winding-up order, but such application must be brought forward as a substantive motion after the winding-up order has been made. *In re The Melbourne and Minmi Colliery Company*,

E. 166

3. On a petition under the "*Companies Statute 1864*," for winding-up a company within the provisions of that Act, it is discretionary with the Court to grant the prayer of the petition. *In re St. Kilda and Brighton Railway Coy.*,

E. 157

4. On a petition under the "*Companies Statute 1864*," for a winding-up order, a company, neither a creditor nor a contributor of the company sought to be wound up, is not entitled to be heard. *Ibid.*

5. The provisions of "*The Companies Statute 1864*," relative to winding up companies do not apply to a Railway Company incorporated by Act of Parliament. *Ibid.*

WITHDRAWAL OF LAND FROM SELECTION.

See SPECIFIC PERFORMANCE.

